

# NEW APPLICATION ORIGINAL



0000102331

ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission  
**DOCKETED**

**Application and Petition for Certificate of Convenience and Necessity to Provide  
Intrastate Telecommunications Services**

SEP 14 2009

Mail original plus 13 copies of completed application to:

For Docket Control Only:  
(Please Stamp Here)

Docket Control Center  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007-2927

T-20701A-09-0437

DOCKETED BY	NR
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Please indicate if you have current applications pending in Arizona as an Interexchange reseller, AOS provider, or as the provider of other telecommunication services.

Type of Service: \_\_\_\_\_

Docket No.: \_\_\_\_\_ Date: \_\_\_\_\_

Date Docketed: \_\_\_\_\_

Type of Service: \_\_\_\_\_

Docket No.: \_\_\_\_\_ Date: \_\_\_\_\_

Date Docketed: \_\_\_\_\_

RECEIVED  
2009 SEP 14 P 4: 22  
ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

## A. COMPANY AND TELECOMMUNICATION SERVICE INFORMATION

(A-1) Please indicate the type of telecommunications services that you want to provide in Arizona and mark the appropriate box(s).

- ☒ Resold Long Distance Telecommunications Services (Answer Sections A, B).
- ☒ Resold Local Exchange Telecommunications Services (Answer Sections A, B, C).
- ☐ Facilities-Based Long Distance Telecommunications Services (Answer Sections A, B, D).
- ☐ Facilities-Based Local Exchange Telecommunications Services (Answer Sections A, B, C, D, E)
- ☐ Alternative Operator Services Telecommunications Services (Answer Sections A, B)
- ☐ Other \_\_\_\_\_ (Please attach complete description)

(A-2) The name, address, telephone number (including area code), facsimile number (including area code), e-mail address, and World Wide Web address (if one is available for consumer access) of the Applicant:

**Greenfly Networks Inc.**

**222 N. 32<sup>nd</sup> St, Billings, MT, 59101**

**Ph. (406) 652 7500 - fax: (406) 305 1027 - [info@clearfly.net](mailto:info@clearfly.net) - [www.clearfly.net](http://www.clearfly.net)**

(A-3) The d/b/a ("Doing Business As") name if the Applicant is doing business under a name different from that listed in Item (A-2):

**Clearfly Communications**

(A-4) The name, address, telephone number (including area code), facsimile number (including area code), and E-mail address of the Applicant's Management Contact:

**Mauro Calvi – 222 N. 32<sup>nd</sup> St , Billings, MT, 59101 –**

**(406) 794 0221 - fax (406) 365 1027 - mauro.calvi@clearfly.net**

(A-5) The name, address, telephone number (including area code), facsimile number (including area code), and E-mail address of the Applicant's Attorney and/or Consultant:

**Monica Tranel – Montana Club Building – 24<sup>th</sup> W. Sixth Ave – Helena – MT 59624**

**(406) 442 7450 - fax (406) 442 7361 - mtranel@luxanmurfitt.com**

(A-6) The name, address, telephone number (including area code), facsimile number (including area code), and E-mail address of the Applicant's Complaint Contact Person:

**Tim Dodge – 222 N. 32<sup>nd</sup> St , Billings, MT, 59101 –**

**(406) 794 0230 - fax (406) 365 1027 - tim.dodge@clearfly.net**

(A-7) What type of legal entity is the Applicant? Mark the appropriate box(s) and category.

☐

Sole proprietorship

☐

Partnership: \_\_\_\_ Limited, \_\_\_\_ General, \_\_\_\_ Arizona, \_\_\_\_ Foreign

☐

Limited Liability Company: \_\_\_\_ Arizona, \_\_\_\_ Foreign

☒

Corporation: \_\_\_\_ "S", \_\_\_\_ **X** "C", \_\_\_\_ Non-profit

☐

Other, specify: \_\_\_\_\_

(A-8) Please include "Attachment A":

Attachment "A" must include the following information:

1. A copy of the Applicant's Certificate of Good Standing as a domestic or foreign corporation, LLC, or other entity in Arizona.
2. A list of the names of all owners, partners, limited liability company managers (or if a member managed LLC, all members), or corporation officers and directors (specify).
3. Indicate percentages of ownership of each person listed in A-8.2.

(A-9) Include your Tariff as "Attachment B".

Your Tariff must include the following information:

1. Proposed Rates and Charges for each service offered (reference by Tariff page number).
2. Tariff Maximum Rate and Prices to be charged (reference by Tariff page number).
3. Terms and Conditions Applicable to provision of Service (reference by Tariff page number).
4. Deposits, Advances, and/or Prepayments Applicable to provision of Service (reference by Tariff page number).
5. The proposed fee that will be charged for returned checks (reference by Tariff page number).

(A-10) Indicate the geographic market to be served:



Statewide. (Applicant adopts statewide map of Arizona provided with this application).



Other. Describe and provide a detailed map depicting the area.

**Statewide**

(A-11) Indicate if the Applicant or any of its officers, directors, partners, or managers has been or are currently involved in any formal or informal complaint proceedings pending before any state or federal regulatory commission, administrative agency, or law enforcement agency.

Describe in detail any such involvement. Please make sure you provide the following information:

1. States in which the Applicant has been or is involved in proceedings.
2. Detailed explanations of the Substance of the Complaints.
3. Commission Orders that resolved any and all Complaints.
4. Actions taken by the Applicant to remedy and/or prevent the Complaints from re-occurring.

**Neither Applicant nor any officer other than Steven Bentley (see explanations below), directors, partners, or managers has been or are currently involved in any formal or informal complaint proceedings pending before any state or federal regulatory commission, administrative agency, or law enforcement agency.**

**Steve Bentley, CFO**

1. States involved in the judgments and/or convictions: Wyoming Board of CPA's.
2. Reasons for the investigation and/or judgment: A complaint was filed against multiple parties in a federal action in the central district of Illinois. Applicant officer was named as one of multiple defendants in the litigation. Applicant officer had a minor role in the case and was dismissed prior to trial on summary judgment. A copy of the order dismissing Applicant Officer is attached.
3. Commission Orders that resolved any and all Complaints. The complaint filed in Wyoming was dismissed following Applicant Officer's dismissal from the federal lawsuit in Illinois. No order was filed.
4. Actions taken by the Applicant to remedy and/or prevent the Complaints from re-occurring: No actions were required of Applicant officer.

(A-12) Indicate if the Applicant or any of its officers, directors, partners, or managers has been or are currently involved in any civil or criminal investigation, or had judgments entered in any civil matter, judgments levied by any administrative or regulatory agency, or been convicted of any criminal acts within the last ten (10) years.

Describe in detail any such judgments or convictions. Please make sure you provide the following information:

1. States involved in the judgments and/or convictions.

2. Reasons for the investigation and/or judgment.
3. Copy of the Court order, if applicable.

**Neither Applicant nor its other officers , directors, partners, or managers has been or are currently involved in any civil or criminal investigation, or had judgments entered in any civil matter, judgments levied by any administrative or regulatory agency, or been convicted of any criminal acts within the last ten (10) years.**

(A-13) Indicate if the Applicant's customers will be able to access alternative toll service providers or resellers via 1+101XXXX access.

☐ Yes

☒ No

(A-14) Is Applicant willing to post a Performance Bond? Please check appropriate box(s).

☒ For Long Distance Resellers, a \$10,000 bond will be recommended for those resellers who collect advances, prepayments or deposits.

☒ Yes

☐ No

If "No", continue to question (A-15).

☒ For Local Exchange Resellers, a \$25,000 bond will be recommended.

☒ Yes

☐ No

If "No", continue to question (A-15).

☐ For Facilities-Based Providers of Long Distance, a \$100,000 bond will be recommended.

☐ Yes

☐ No

If "No", continue to question (A-15).

☐ For Facilities-Based Providers of Local Exchange, a \$100,000 bond will be recommended.

☐ Yes

☐ No

If any box in (A-14) is marked "No", continue to question (A-15).

Note: Amounts are cumulative if the Applicant is applying for more than one type of service.

(A-15) If any box in (A-14) is marked "No", provide the following information. Clarify and explain the Applicant's deposit policy (reference by tariff page number). Provide a detailed explanation of why the Applicant's superior financial position limits any risk to Arizona consumers.

**The Company will not collect advances, prepayments or deposits.**

(A-16) Submit copies of affidavits of publication that the Applicant has, as required, published legal notice of the Application in all counties where the Applicant is requesting authority to provide service.

Note: For Resellers, the Applicant must complete and submit an Affidavit of Publication Form as Attachment "C" before Staff prepares and issues its report. Refer to the Commission's website for Legal Notice Material (Newspaper Information, Sample Legal Notice and Affidavit of Publication). For Facilities-Based Service Providers, the Hearing Division will advise the Applicant of the date of the hearing and the publication of legal notice. Do not publish legal notice or file affidavits of publication until you are advised to do so by the Hearing Division.

Company understands this affidavit is not required at this time and that it may be requested by the Commission at a later stage of the review process of the present Application.

(A-17) Indicate if the Applicant is a switchless reseller of the type of telecommunications services that the Applicant will or intends to resell in Arizona:

☒ Yes

☐ No

If "Yes", provide the name of the company or companies whose telecommunications services the Applicant resells.

**The company intends to resell services provided by Qwest or other similar carriers**

(A-18) List the States in which the Applicant has had an application approved or denied to offer telecommunications services similar to those that the Applicant will or intends to offer in Arizona:

Note: If the Applicant is currently approved to provide telecommunications services that the Applicant intends to provide in Arizona in less than six states, excluding Arizona, list the Public Utility Commission ("PUC") of each state that granted the authorization. For each PUC listed provide the name of the contact person, their phone number, mailing address including zip code, and e-mail address.

State	PUC	Address	Phone number	
MT	MT Public Services Commission	1701 Prospect Ave P.O. Box 202601 Helena, MT 59620-2601 Email address: NA	(406)444-6185	Mike Lee
OR	OR Public Utility Commission Administrative Hearings Division	PO Box 2148 Salem, OR 97308-2148 Email address: NA	(503) 378-6137	Lee Sparling
ND	ND Public Service Commission	600 E. Boulevard, Dept. 408 Bismarck, ND 58505-0480 Email address: NA	(701) 328-2400	Illona Jeffcoat-Sacco
WA	WA Utilities and Transportation Commission	1300 South Evergreen Park Dr. SW PO Box 47250, Olympia, WA 98504 Email address: NA	(360) 664 1160	David Danner

(A-19) List the States in which the Applicant currently offers telecommunications services similar to those that the Applicant will or intends to offer in Arizona.

Note: If the Applicant currently provides telecommunication services that the Applicant intends to provide in Arizona in six or more states, excluding Arizona, list the states. If the Applicant does not currently provide telecommunications services that the Applicant intends to provide in Arizona in five or less states, list the key personnel employed by the Applicant. Indicate each employee's name, title, position, description of their work experience, and years of service in the telecommunications services industry.

		Description of experience	Years in telecom industry
Mauro Calvi	CEO	Master in Electrical Engineering Polytechnic of Milan, Italy. Held several product management and business development positions at large and small software, Internet and Telecommunications companies, including Ashton-Tate, Microsoft, Telecom Italia, and Transaria. Co-founded Company in 2006	15
Tim Dodge	Chief Operations Officer	Electrical Engineer, MT State University. Entrepreneur. Founder and COO of Montana's first DSL provider and CLEC Multiband, acquired by Transaria Inc. Sales Engineer for Transaria. Co-founded Company in 2006	12
Steve Bentley	Chief Financial Officer	Bachelors of Science in Business Administration from the California State University at Fullerton and Masters of Business Taxation from the University of Southern California. Certified public accountant licensed in California, Colorado, and Wyoming. Past chairman of the AICPA Tax Division's Tax Technologies Committee. Past service with the AICPA included serving on the Tax Executive Committee, Tax Technologies Committee, Computer Information Retrieval Committee.	2
Chris Hunter	Chief Marketing Officer	Director Business Development at Transaria Inc. Led the development and deployment of the company's sales channel program. Co-founded Company in 2006	8
Cody Lerum	Chief Technology Officer	Was senior network engineer of TransAria, Technical proficiencies include Linux/Windows server management, IP carrier networks (wire-line and wireless technologies). Holds the following technical certifications: Cisco Certified Design Professional (CCDP), Cisco Certified Network Professional (CCNP), Juniper Networks Certified Internetworking Associate (JNCIA), and Cisco Certified Internetworking Expert (CCIE).	6

(A-20) List the names and addresses of any alternative providers of the service that are also affiliates of the telecommunications company, as defined in R14-2-801.

None

(A-21) Check here if you wish to adopt as your petition a statement that the service has already been classified as competitive by Commission Decision:

- ☒ Decision # 64178 Resold Long Distance
- ☒ Decision # 64178 Resold LEC
- ☐ Decision # 64178 Facilities Based Long Distance
- ☒ Decision # 64178 Facilities Based LEC

### B. B. FINANCIAL INFORMATION

(B-1) Indicate if the Applicant has financial statements for the two (2) most recent years.

☒ Yes ☐ No

If "No," explain why and give the date on which the Applicant began operations.

(B-2) Include "Attachment D".

Provide the Applicant's financial information for the two (2) most recent years.

1. A copy of the Applicant's balance sheet.
2. A copy of the Applicant's income statement.
3. A copy of the Applicant's audit report.
4. A copy of the Applicant's retained earnings balance.
5. A copy of all related notes to the financial statements and information.

Note: Make sure "most recent years" includes current calendar year or current year reporting period.

(B-3) Indicate if the Applicant will rely on the financial resources of its Parent Company, if applicable.

**Greenfly Networks relies on the financial resources of its majority shareholder, Better Business Systems Inc. to fund operations until profitability, which is expected in Q3 2010.**

(B-4) The Applicant must provide the following information.

1. Provide the projected total revenue expected to be generated by the provision of telecommunications services to Arizona customers for the first twelve months following certification, adjusted to reflect the maximum rates for which the Applicant requested approval. Adjusted revenues may be calculated as the number of units sold times the maximum charge per unit.
2. Provide the operating expenses expected to be incurred during the first twelve months of providing telecommunications services to Arizona customers following certification.
3. Provide the net book value (original cost less accumulated depreciation) of all Arizona jurisdictional assets expected to be used in the provision of telecommunications service to Arizona customers at the end of the first twelve months of operation. Assets are not limited to plant and equipment. Items such as office equipment and office supplies should be included in this list.
4. If the projected value of all assets is zero, please specifically state this in your response.
5. If the projected fair value of the assets is different than the projected net book value, also provide

the corresponding projected fair value amounts.

See attachment E.

**C. RESOLD AND/OR FACILITIES-BASED LOCAL EXCHANGE TELECOMMUNICATIONS SERVICES**

(C-1) Indicate if the Applicant has a resale agreement in operation,

☒ Yes

☐ No

If "Yes", please reference the resale agreement by Commission Docket Number or Commission Decision Number.

**Qwest Corporation Interconnection agreement CDS-090209-0002**

**D. FACILITIES-BASED LONG DISTANCE AND/OR FACILITIES BASED LOCAL EXCHANGE TELECOMMUNICATIONS SERVICES**

(D-1) Indicate if the Applicant is currently selling facilities-based long distance telecommunications services AND/OR facilities-based local exchange telecommunications services in Arizona. This item applies to an Applicant requesting a geographic expansion of their CC&N:

☐ Yes

☐ No

If "Yes," provide the following information:

1. The date or approximate date that the Applicant began selling facilities-based long distance telecommunications services AND/OR facilities-based local exchange telecommunications services in Arizona.
2. Identify the types of facilities-based long distance telecommunications services AND/OR facilities-based local exchange telecommunications services that the Applicant sells in Arizona.

If "No," indicate the date when the Applicant will begin to sell facilities-based long distance telecommunications AND/OR facilities-based local exchange telecommunications services in Arizona.

**E. FACILITIES-BASED LOCAL EXCHANGE TELECOMMUNICATIONS SERVICES**

(E-1) Indicate whether the Applicant will abide by the quality of service standards that were approved by the Commission in Commission Decision Number 59421:

☐ Yes

☐ No



(E-2) Indicate whether the Applicant will provide all customers with 911 and E911 service, where available, and will coordinate with incumbent local exchange carriers ("ILECs") and emergency service providers to provide this service:

☐ Yes

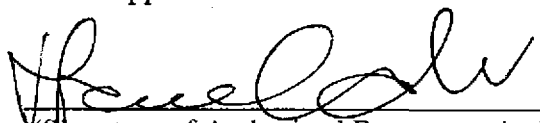
☐ No

(E-3) Indicate that the Applicant's switch is "fully equal access capable" (i.e., would provide equal access to facilities-based long distance companies) pursuant to A.A.C. R14-2-1111 (A):

☐ Yes

☐ No

I certify that if the applicant is an Arizona corporation, a current copy of the Articles of Incorporation is on file with the Arizona Corporation Commission and the applicant holds a Certificate of Good Standing from the Commission. If the company is a foreign corporation or partnership, I certify that the company has authority to transact business in Arizona. I certify that all appropriate city, county, and/or State agency approvals have been obtained. Upon signing of this application, I attest that I have read the Commission's rules and regulations relating to the regulations of telecommunications services (A.A.C. Title 14, Chapter 2, Article 11) and that the company will abide by Arizona state law including the Arizona Corporation Commission Rules. I agree that the Commission's rules apply in the event there is a conflict between those rules and the company's tariff, unless otherwise ordered by the Commission. I certify that to the best of my knowledge the information provided in this Application and Petition is true and correct.

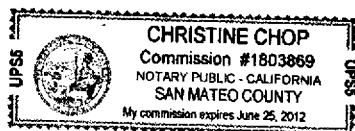
  
(Signature of Authorized Representative)

9/8/09  
(Date)

Mauro Calvi  
(Print Name of Authorized Representative)

CEO  
(Title)

SUBSCRIBED AND SWORN to before me this 8 day of September, 2009



  
NOTARY PUBLIC

My Commission Expires 25 June 2012

## ATTACHMENTS

**Attachment A: Certificate of Good Standing, List of Officers and Directors or Owners and Percentage of Ownership**


**AZ CORPORATION COMMISSION  
FILED**
DO NOT PUBLISH  
THIS SECTION

1. The corporate name must contain a corporate ending which may be "corporation," "association," "company," "limited," "incorporated" or an abbreviation of any of these words. If you are the holder or assignee of a tradename or trademark, attach a Trade Name Certificate. If your name is not available for use in Arizona, you must adopt a fictitious name and provide a resolution adopting the name, which must be executed by the corporation Secretary.

3. You must provide the total duration in years for which your corporation was formed to endure. If perpetual succession, so indicate in this section. Do not leave blank, or state "not applicable".

6. The statutory agent must provide a street address. If statutory agent has a P.O. Box, then they must also provide a physical street address/location.

CF:0024  
Rev: 12/2008

MAY 19 2009

**APPLICATION FOR AUTHORITY  
TO TRANSACT BUSINESS  
IN ARIZONA**
FILE NO. F-15251434

Pursuant to A.R.S. Title 10, Chapter 15 and 38

The name of the corporation is: Greenfly Networks, Inc.A(n) Nevada Corporation  
(State, Province or Country)☒ We are a foreign corporation applying for authority to transact business in the state of Arizona.

1. The exact name of the foreign corporation is:

Greenfly Networks, Inc.

If the exact name of the foreign corporation is not available for use in this state, then the fictitious name adopted for use by the corporation in Arizona is:

(FN).

2. The name of the state, province or country in which the foreign corporation is incorporated is:

Nevada3. The foreign corporation was incorporated on the 16th day of November2006 and the period of its duration is: perpetual

4. The street address of the principal office of the foreign corporation in the state, province or country of its incorporation is:

3838 Raymert Dr., Ste. 3Las Vegas, NV 89121

5. The name and street address of the statutory agent for the foreign corporation in Arizona is:

National Registered Agents, Inc.638 North Fifth AvenuePhoenix, AZ 85003
**AZ CORPORATION COMMISSION  
FILED**

MAY 18 2009

F-15251434

FILE NO.

Page 3 of 6

DO NOT PUBLISH  
THIS SECTION

5.b. Indicate to  
which address the  
Annual Report  
should be mailed.

6. If the purpose of  
your corporation has  
any limitations  
please indicate.  
If not, state no  
limitations or leave  
blank.

8. The total number  
of authorized shares  
cannot be 'zero' or  
'N/A'. Include  
authorized, not  
issued shares in this  
section.

CF:0024  
Rev. 12/2008

5.a. The street address of the known place of business of the foreign corporation in Arizona  
IF DIFFERENT from the street address of the statutory agent is:

5.b. The Annual Report and general correspondence should be mailed to the address  
specified above in section 4 ☐ or 5a ☒.

6. The purpose of the corporation is to engage in any and all lawful business in which  
corporations may engage in the state, province or country under whose law the foreign  
corporation is incorporated, with the following limitations if any:

7. The names and business addresses of the current directors and officers of the foreign  
corporation are: (Attach additional sheets if necessary.)

Name: See attached [title]

Address: \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Name: \_\_\_\_\_ [title]

Address: \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Name: \_\_\_\_\_ [title]

Address: \_\_\_\_\_

City, State, Zip \_\_\_\_\_

8. The foreign corporation is authorized to issue 6,000,000 shares, itemized as follows:  
(Attach additional sheets if necessary.)

5,000,000 shares of Common [class or series] stock at  
\_\_\_\_\_ no par value or par value of \$ 0.001 per share.

1,000,000 shares of Preferred [class or series] stock at  
\_\_\_\_\_ no par value or par value of \$ 0.001 per share.

\_\_\_\_\_ shares of \_\_\_\_\_ [class or series] stock at  
\_\_\_\_\_ no par value or par value of \$ \_\_\_\_\_ per share.

GREENFLY NETWORKS, INC.

FORM CF0024

QUESTION 7 – CURRENT DIRECTORS AND OFFICERS

1. Mauro Camj – President & Director  
P.O. Box 20009  
Billings, MT 59104-0009
2. Timothy Dodge – Secretary, COO & Director  
P.O. Box 20009  
Billings, MT 59104-0009
3. Chris Hunter – VP Marketing, Director  
P.O. Box 20009  
Billings, MT 59104-0009
4. Cody Lerum – CTO, Director  
P.O. Box 20009  
Billings, MT 59104-0009
5. Steven K. Bentley – Treasurer & CFO  
P.O. Box 81590  
Billings, MT 59108-1590
6. Arthur Geiger – Chair of Board & Director  
P.O. Box 81590  
Billings, MT 59108-1590

DO NOT PUBLISH  
THIS SECTION

9. The total number of issued shares cannot be 'N/A'.

The Application must be accompanied by the following:  
GA Certificate of Disclosure, executed within 30 days of delivery to the Commission, by a duly authorized officer

GA certified copy of your articles of incorporation, all amendments and mergers (AZ Const. Art. XIV, § 8) and a certificate of existence or document of similar import duly authenticated (within 60 days) by the official having custody of corporate records in the state, province or country, under whose laws the corporation is incorporated.

The agent must consent to the appointment by executing the consent.

9. The foreign corporation has issued 4,700,000 shares, itemized as follows:

4,700,000 shares of Common [class or series] stock at  
X no par value or par value of \$ \_\_\_\_\_ per share.

\_\_\_\_\_ shares of \_\_\_\_\_ [class or series] stock at  
\_\_\_\_\_ no par value or par value of \$ \_\_\_\_\_ per share.

\_\_\_\_\_ shares of \_\_\_\_\_ [class or series] stock at  
\_\_\_\_\_ no par value or par value of \$ \_\_\_\_\_ per share.

10. The character of business the foreign corporation initially intends to conduct in Arizona is:

Telecommunications & Data Provider

Dated this 22 day of April, 2009.

Executed by

Steven K. Bentley  
Duly Authorized Officer or Director

Steven K. Bentley, Secretary

[print name]

[title]

PHONE 406-869-4574  
[optional]

FAX 406-869-4614  
[optional]

ACCEPTANCE OF APPOINTMENT BY STATUTORY AGENT

The undersigned hereby acknowledges and accepts the appointment as statutory agent of this corporation effective this 22nd day of April, 2009.

Tanya Dietrich  
Signature

Tanya Dietrich, Asst. Secretary  
[Print Name]

National Registered Agents, Inc.

[If signing on behalf of a company serving as  
statutory agent, print company name here]



**PROFIT  
CERTIFICATE OF DISCLOSURE**  
Pursuant to A.R.S. §10-202. (D).

Greenfly Networks, Inc.

EXACT CORPORATE NAME

A. Has any person serving either by election or appointment as officer, director, trustee, incorporator and persons controlling or holding over 10% of the issued and outstanding common shares or 10% of any other proprietary, beneficial or membership interest in the corporation:

1. Been convicted of a felony involving a transaction in securities, consumer fraud or antitrust in any state or federal jurisdiction within the seven-year period immediately preceding the execution of this Certificate?
2. Been convicted of a felony, the essential elements of which consisted of fraud, misrepresentation, theft by false pretenses, or restraint of trade or monopoly in any state or federal jurisdiction within the seven-year period immediately preceding the execution of this Certificate?
3. Been or are subject to an injunction, judgment, decree or permanent order of any state or federal court entered within the seven-year period immediately preceding the execution of this Certificate wherein such injunction, judgment, decree or permanent order:  
(a) involved the violation of fraud or registration provisions of the securities laws of that jurisdiction; or  
(b) involved the violation of the consumer fraud laws of that jurisdiction; or  
(c) involved the violation of the antitrust or restraint of trade laws of that jurisdiction?

Yes \_\_\_\_\_ No X

B. IF YES, the following information MUST be attached:

1. Full name, prior name(s) and aliases, if used.
2. Full birth name.
3. Present home address.
4. Prior addresses (for immediate preceding 7-year period).
5. Date and location of birth.
6. The nature and description of each conviction or judicial action, date and location, the court and public agency involved and file or cause number of case.

C. Has any person serving as an officer, director, trustee, incorporator or holder of over twenty per cent of the issued and outstanding common shares or twenty per cent of any other proprietary, beneficial or membership interest in the corporation served in any such capacity or held a twenty per cent interest in any other corporation in any jurisdiction on the bankruptcy or receivership of the other corporation?

Yes \_\_\_\_\_ No X

IF YOUR ANSWER TO THE ABOVE QUESTION IS "YES", YOU MUST ATTACH THE FOLLOWING INFORMATION FOR EACH CORPORATION:

1. Name and address of the corporation.
2. Full name (including aliases) and address of each person involved.
3. State(s) in which the corporation:  
(a) Was incorporated.  
(b) Has transacted business.
4. Dates of corporate operation.
5. Date and case number of bankruptcy or receivership.

Under penalties of law, the undersigned incorporator(s)/officer(s) declare(s) that I/we have examined this Certificate, including any attachments, and to the best of my/our knowledge and belief it is true, correct and complete, and hereby declare as indicated above. THE SIGNATURE(S) MUST BE DATED WITHIN THIRTY (30) DAYS OF THE DELIVERY DATE.

BY Steven K. Bentley BY \_\_\_\_\_

PRINT NAME Steven K. Bentley PRINT NAME \_\_\_\_\_

TITLE Secretary DATE 5/18/09 TITLE \_\_\_\_\_ DATE \_\_\_\_\_

**DOMESTIC CORPORATIONS:** ALL INCORPORATORS MUST SIGN THE INITIAL CERTIFICATE OF DISCLOSURE. If within sixty days, any person becomes an officer, director, trustee or person controlling or holding over 10% of the issued and outstanding shares or 10% of any other proprietary, beneficial, or membership interest in the corporation and the person was not included in this disclosure, the corporation must file an AMENDED certificate signed by at least one duly authorized officer of the corporation.

**FOREIGN CORPORATIONS:** MUST BE SIGNED BY AT LEAST ONE DULY AUTHORIZED OFFICER OF THE CORPORATION.

CF: 0022 - Business Corporations  
Rev: 09/2008

Arizona Corporation Commission  
Corporations Division

List of Owners, Directors and Officers and percentage ownership

<b>Name</b>	<b>Status</b>	<b>Approx. Percentage ownership</b>
Better Business System Inc.	Owner	84%
Steven Bentley	Officer	
Mauro Calvi	Owner, Director, Officer	4%
Tim Dodge	Owner, Director, Officer	4%
Art Geiger	Director	
Chris Hunter	Owner, Director, Officer	4%
Cody Lerum	Owner, Director, Officer	4%

**Attachment B - Tariffs**

This tariff contains the descriptions, regulations, and rates applicable to the provision of local exchange telecommunications services provided by Greenfly Networks, Inc, with principal offices at 222 North 32<sup>nd</sup> Street, Suite 904, Billings, MT 59101, for services furnished within the State of Arizona. This tariff is on file with the Arizona Corporation Commission, and copies may be inspected, during normal business hours, at the Company's principal place of business.

## Attachment D - Financial Information

### GREENFLY NETWORKS INC Income Statement For the Three Months ended July 31, 2009

<b>Sales Revenues</b>	
Recurring Income	\$ 379,258.90
Installation Income	3,410.00
CPE Rental Income	22,344.87
Sales Discounts	(8,277.53)
<b>Total Sales Revenues</b>	<b>\$ 396,736.24</b>
<b>Cost of Goods Sold</b>	
Recurring Revenue Costs	\$ 184,007.52
Installation Costs	20,688.36
Commissions Expense	17,089.40
CPE Equipment lease expense	15,576.80
<b>Total Costs of Goods Sold</b>	<b>\$ 218,362.08</b>
<b>Gross Profit</b>	<b>\$ 178,374.16</b>
<b>Operating Expenses</b>	
Bad Debt	\$ 503.51
Bank Service Charges	395.32
Co-location costs	368.67
Contract labor	5,055.49
Contributions	150.00
Data Center Costs	12,740.43
Depreciation Expense	24,946.60
Dues and Subscriptions	2,527.88
Equipment Rental	36,452.75
General transport costs	48,285.71
Insurance	18.00
Interest Expense	10,455.36
Licenses and Permits	222.00
Marketing Expenses	6,004.73
Miscellaneous	2,339.52
Office Lease	9,921.32
Office Supplies	1,893.32
Payroll Expenses	172,287.70
Postage and Delivery	406.53
Professional Education	1,200.00
Professional Fees	2,609.95
Repairs & Maintenance	8,087.92
Supplies & Software	12,460.53
Taxes	825.31
Telephone	3,772.67
Travel, Meals & Ent.	10,030.41
<b>Total Operating Expenses</b>	<b>\$ 371,951.64</b>
<b>Net Loss</b>	<b>\$ (193,577.48)</b>

**GREENFLY NETWORKS INC**  
**Balance Sheet**  
**July 31, 2009**

**ASSETS**

<b>Current Assets</b>	
Checking/Savings	\$ 25,251.85
Accounts Receivable	20,010.66
Other Current Assets	
Avitus Group Subscrip. Recvble	356,360.36
Employee Advances	26.97
Total Other Current Assets	<u>\$ 356,387.33</u>
<b>Total Current Assets</b>	<b>\$ 401,649.84</b>
<b>Fixed Assets</b>	
Office Equipment	\$ 19,965.05
Telecommunication Equipment	494,178.35
	<u>\$ 514,143.40</u>
Less Accumulated Depreciation	(127,996.59)
<b>Total Fixed Assets</b>	<u><b>\$ 386,146.81</b></u>
<b>Other Assets</b>	
Deposits	\$ 24,142.27
Deferred Tax Assets	492,300.00
<b>Total Other Assets</b>	<u><b>\$ 516,442.27</b></u>
<b>TOTAL ASSETS</b>	<b><u>\$ 1,304,238.92</u></b>

**LIABILITIES AND STOCKHOLDERS' EQUITY**

<b>Current Liabilities</b>	
Accounts Payable	\$ 24,911.13
Credit Cards	757.23
Credit Lines	7,073.19
Excise Taxes & Fees Payable	20,684.78
Current Maturities Long Term Debt	170,139.00
Related Party Loans	10,000.00
Insurance Premium Payable	190.00
<b>Total Current Liabilities</b>	<u><b>\$ 233,755.33</b></u>
<b>Long Term Liabilities</b>	
Note Payable Microsoft	\$ 301,716.94
Note Payable Skyline Computer	4,750.25
Less Current Maturities	(170,139.00)
Deferred Tax Liability	27,800.00
<b>Total Long Term Liabilities</b>	<u><b>\$ 164,128.19</b></u>
<b>Total Liabilities</b>	<b>\$ 397,883.52</b>
<b>Equity</b>	
Common Stock	\$ 1,803,461.87
Retained Earnings	(703,528.99)
Net Income	(193,577.48)
<b>Total Equity</b>	<u><b>\$ 906,355.40</b></u>
<b>TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY</b>	<b><u>\$ 1,304,238.92</u></b>

## 1. SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES:

### Organization and Nature of Operations

Greenfly Networks, Inc. (the Company, Greenfly) is a corporation organized on November 16, 2006 in the State of Nevada that conducts business under the name of Clearly Communications. The Company is a startup infrastructure-based provider of communications solutions for the small and medium business community including local and long distance voiceover- IP (internet protocol) telephone services and internet access in single integrated packages. Based in Billings, Montana, the Company started offering its services in January of 2008 in approximately 300 markets in the following 12 states of the western United States: Washington, Utah, Idaho, Wyoming, Montana, Oregon, Colorado, Arizona, New Mexico, North Dakota, Minnesota, and Iowa.

### Financial Statement Presentation and Affiliate

On August 1, 2008 Better Systems, Inc., dba Avitus Group, increased its stock ownership in the Company from 28.00% to 84.07% whereupon Greenfly Networks, Inc. became a consolidated subsidiary of Avitus Group. Greenfly previously reported on a fiscal year ending October 30. Upon becoming a consolidated subsidiary of Avitus Group, Greenfly commenced reporting on a fiscal year ending March 31st, consistent with Avitus Group. Accordingly, the accompanying financial statements have been prepared as of July 31, 2008 and for the nine months then ended.

### Basis of Accounting

The accompanying financial statements have been prepared on the accrual basis of accounting.

### Cash and Cash Equivalents

All highly liquid securities, including certificates of deposit, with original maturities of three months or less are considered to be cash equivalents.

### Accounts Receivable

The Company grants credit to customers who operate businesses in an unlimited number of industries. Ongoing credit evaluations are conducted on those customers but, generally, no collateral or deposits are required. The Company maintains its allowance for doubtful trade accounts receivable based upon management's evaluation of what they believe to be ultimately collectible. As of July 31, 2008 there were no accounts receivable outstanding over 90 days and management believes that all accounts receivable are fully collectible. Accordingly, no provision for doubtful accounts has been provided for. Finance charges are accrued on trade receivables outstanding over 30 days and until such time as past due receivables are written off. Trade receivables are written off at such time as management deems them to be uncollectible.

### Property and Equipment

Property and equipment are recorded at original cost unless impaired under the provisions of SFAS 121, "Accounting for the Impairment of Long-Lived Assets and for Long-Lived Assets to be Disposed Of". If applicable, cost includes material, labor, contractor costs, and construction

overheads. Expenditures for major renewals and betterments that extend the useful lives of property and equipment are capitalized. Expenditures for maintenance and repairs are charged to expense as incurred. For financial statement purposes, depreciation of property and equipment is provided utilizing the straight-line method over the estimated useful lives of the applicable asset which are disclosed below and which are periodically reviewed and adjusted by management. The Company utilizes accelerated methods and rates of depreciation for income tax purposes.

#### Estimated Life in Years

Office Equipment 4 - 10

Telecommunications Equipment 5 - 10

#### Income Taxes

Income taxes are provided for the tax effects of transactions reported in the financial statements and consist of taxes currently due plus deferred taxes related primarily to differences between the bases of property and equipment for financial and income tax reporting. The deferred tax assets and liabilities represent the future tax return consequences of those differences, which will either be taxable or deductible when the assets and liabilities are recovered or settled. Deferred taxes also are recognized for operating losses that are available to offset future federal and state income taxes.

#### Comprehensive Income

Comprehensive income consists of net income and other comprehensive income defined as changes in shareholders' equity from transactions other than with the Company. The Company did not have any other comprehensive income for the year ended July 31, 2008.

#### Financial Instruments

At July 31, 2008, the carrying value of cash and cash equivalents, revolving lines of credit and other credit facilities approximated fair value due to either the short-term nature of the instruments or variable interest rates associated with the financial instruments.

#### Use of Estimates

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. Accordingly, actual results could differ from those estimates.

#### 2. COMMON STOCK SUBSCRIPTION LIABILITY:

When the Company was originally incorporated on November 16, 2006 it was authorized by the Nevada Secretary of State to issue 75,000 shares of no par value common stock. On May 23, 2007, the articles of incorporation were amended to increase its authorized shares to 5,000,000 of common shares with a par value of \$0.001 per share and 1,000,000 of preferred shares with a par value of \$0.001. As of August 1, 2008 the shareholder's voted to increase the number of authorized common shares to 100,000,000. On February 1, 2007, the Company entered into a stock

subscription agreement with the parents of an existing shareholder whereby the individuals agreed to invest a total amount of \$10,000 in the Company as a subscription for 10,000 shares of common stock at a price of \$1.00 per share. The subscription agreement was later modified to provide for 100,000 shares of common stock at \$0.10 per share when the total number of shares authorized and outstanding changed on August 1, 2008. No shares of stock have been issued to the subscribers as of July 31, 2008 and the subscription agreement contains no other provisions for repayment or other settlement.

### 3. PLEDGED ASSETS, LINES OF CREDIT AND LONG-TERM DEBT:

\$ 2,416

Revolving Lines of Credit: \$25,000 revolving credit facility provided by US Bank in the name of a minority shareholder of Avitus Group with a variable interest rate, currently 8.99%, unsecured

Notes Payable \$471,682 note payable dated October 10, 2007 to Microsoft Financing due in 6 monthly installments of \$50, then 36 monthly installments of \$15,355, including interest at the rate of 7.95%, secured by equipment \$ 454,392

\$10,826 capital lease obligation dated July 12, 2007 payable to Skyline Advanced Technology Services due in 36 monthly installments of \$411, including interest imputed at the rate of 20.77%, secured by equipment with an original depreciable basis of \$10,826 and a current remaining book value of approximately \$9,000. \$ 8,287

Total Long Term Debt 462,679

Less Amount Due Within 1 Year \$ 147,000

Amount Due After 1 year \$ 315,679

Aggregate maturities of long-term debt as of July 31, 2008 were as follows:

Year Ending July 31,	
2009	147,000
2010	170,140
2011	145,539
Tot	\$ 462,679

### 4. LEASING ARRANGEMENTS:



The Company applies the provisions of SFAS 13, "Accounting for Leases", to all leasing transactions. In addition, the Company applies the provisions of numerous other accounting pronouncements that provide specific guidance and additional requirements related to accounting for leases,

The Company leases certain office facilities, data storage facilities, equipment, and telecommunication network facilities under several non-cancelable operating leases. As of July 31, 2008, the Company was obligated under six such leases with commencement dates ranging from December 1, 2007 to July 1, 2008, ending dates ranging from April 30, 2009 to April 2, 2013, and terms ranging from 12 to 60 months. The leases include various renewal options, provide for additional variable charges based upon utilization, and generally continue on a month to-month or year-to-year basis at termination of the initial lease period. As of July 31, 2008 the total minimum monthly rents required under the leases was approximately \$16,325. Rent expense under those leases for the nine months ended July 31, 2008 totaled approximately \$67,282. Certain of those leases are with related parties and are further described in below. The remaining future minimum lease payments under the operating leases as of July 31, 2008 were as follows:

Year Ending July 31,	
2009	\$ 177,538
2010	125,352
2011	53,750
2012	10,500
2013	8,500
Tot	\$ 375,640

##### 5. INCOME TAXES:

A deferred tax liability of \$10,600 has been recognized for the taxable temporary difference related to the use of accelerated cost recovery method of recording depreciation for income tax reporting, and a deferred tax asset of \$283,300 has been recognized for the deductible difference related to net operating losses being carried forward for income tax purposes. Since the loss carryforwards are expected to be used in future years, no valuation allowance has been provided. The loss carryforwards total approximately \$708,300 and approximately \$89,800 and \$618,500 expire in the fiscal years ending July 31, 2027 and July 31, 2028 respectively. The components of the deferred tax asset and liability are individually classified as current and noncurrent based on their characteristics. The tax provision differs from the amount that would be calculated by applying federal statutory rates to income before income taxes because no tax benefit has been recognized for nondeductible operating expenses and the company is subject to state income taxes. The provision for income taxes in the accompanying statement of income consists entirely of deferred taxes. A summary of the deferred tax benefits (assets) and liabilities follows:

	Non current Assets	Non Current Liabilities
Difference in depreciation	\$ -0-	\$9,800
Net operating losses carryforward	\$247,390	\$ -0-

\$247,390

\$9,800

#### 6. RELATED PARTY TRANSACTIONS:

Buzzkill Equipment Leasing, LLC (Buzzkill) is a limited liability Company owned by the shareholders of Greenfly Networks, Inc. and shareholders of the Company's parent company, Avitus Group. Buzzkill and Avitus Group purchase consumer premises equipment (CPE) and lease it to Buzzkill for 97% of the revenue generated from the equipment. For the nine months ended July 31, 2008, the Company incurred CPE lease expense in the amount of \$1,239 and \$19 for CPE leased from Buzzkill and Avitus Group, respectively. As of July 31, 2008, the Company owed Buzzkill and Avitus Group \$666 and \$19, respectively on the leases. The amount payable is included in accounts payable in the accompanying financial statement as the lease obligations are settled in the ordinary course of business.

The Company's parent, Avitus Group, is primarily engaged in the business of a professional employment organization (PEO). As a PEO, Avitus Group provides employee services to organizations and as such is the employer of record for those organizations. For the nine months ended July 31, 2008, the Company incurred salary and wage expenses of \$187,727 and payroll tax expenses of \$40,563 through Avitus Group. There were no amounts owing to Avitus Group for those services as of July 31, 2008. The Company provides communications solutions to Avitus Group. Total revenue earned by the Company from Avitus Group for the nine months ended July 31, 2008 was approximately \$30,337. Amounts billed to Avitus Group are offset against the note payable owed to Avitus Group on a monthly basis.

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**GREENFLY NETWORKS, INC.**  
**dba CLEARFLY COMMUNICATIONS**  
**AUDITED FINANCIAL STATEMENTS**  
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## INDEPENDENT AUDITORS' REPORT

Summers McNea, P.C.  
80 25th Street West  
Billings, Montana 59102  
406.652.2320  
Toll-Free: 1.800.468.5333  
Fax: 406.652.2043  
[www.summers-mcnea.com](http://www.summers-mcnea.com)

To the Board of Directors  
Greenfly Networks, Inc.  
dba Clearfly Communications  
Billings, Montana

We have audited the accompanying balance sheet of Greenfly Networks, Inc. (a Nevada corporation), dba Clearfly Communications, as of March 31, 2009, and the related statements of income, stockholders' equity, and cash flows for the eight months then ended. These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Greenfly Networks, Inc. as of March 31, 2009, and the results of its operations and its cash flows for the eight months then ended in conformity with accounting principles generally accepted in the United States of America.

*Summers, McNea & Company, P.C.*  
Summers, McNea & Company, P.C.  
Certified Public Accountants

August 10, 2009

# **GREENFLY NETWORKS, INC.**

**dba Clearfly Communications**

**Balance Sheet**

**March 31, 2009**

## **ASSETS**

### **Current Assets**

Cash and Equivalents	\$ 12,782
Accounts Receivable	16,117
Stock Subscription Receivable	<u>652,185</u>
Total Current Assets	\$ <u>681,084</u>

### **Property and Equipment**

Office Equipment	\$ 17,616
Telecommunications Equipment	<u>491,432</u>
	\$ <u>509,048</u>
Less: Accumulated Depreciation	<u>(103,050)</u>
Total Property and Equipment	\$ <u>405,998</u>

### **Other Assets**

Deposits	\$ 24,142
Deferred Tax Asset	<u>492,300</u>
Total Other Assets	\$ <u>516,442</u>

### **Total Assets**

**\$ 1,603,524**

The accompanying notes are an integral part of these financial statements.

# **GREENFLY NETWORKS, INC.**

**dba Clearly Communications**

**Balance Sheet**

**March 31, 2009**

## **LIABILITIES AND STOCKHOLDERS' EQUITY**

### **Current Liabilities**

Revolving Lines of Credit	\$ 5,308
Current Maturities of Long-Term Debt	165,252
Accounts Payable	67,417
Excise Taxes and Fees Payable	21,853
Total Current Liabilities	<u>\$ 259,830</u>

### **Long-Term Liabilities**

Stock Subscription Liability	\$ 10,000
Notes Payable, net of current maturities	207,736
Deferred Tax Liability	27,800
Total Long-Term Liabilities	<u>\$ 245,536</u>
Total Liabilities	<u>\$ 505,366</u>

### **Commitments and Contingencies**

-

### **Stockholders' Equity**

Common Stock	\$ 1,801,687
Accumulated Deficit	(703,529)
Total Stockholders' Equity	<u>\$ 1,098,158</u>

<b>Total Liabilities and Stockholders' Equity</b>	<b><u>\$ 1,603,524</u></b>
---	----------------------------

The accompanying notes are an integral part of these financial statements.

**GREENFLY NETWORKS, INC.**  
**dba Clearfly Communications**  
**Statement of Income**  
**For the Eight Months Ended March 31, 2009**

**Sales**

Recurring Charges Revenue	\$ 497,587
Installation Revenue	21,109
Equipment Rental Revenue	25,392
Sales Discounts	(11,314)
Total Sales	<u>\$ 532,774</u>

**Costs of Sales**

Costs of Recurring Charges Revenue	\$ 227,880
Costs of Installation Revenue	36,805
Costs of Equipment Rental Revenue	17,586
Commissions	19,403
Discounts and Allowances	(3,651)
Total Costs of Sales	<u>\$ 298,023</u>

**Gross Profit**

\$ 234,751

**Operating Expenses**

Bank Service Charges and Credit Card Fees	\$ 677
Co-Location Costs	5,397
Contracted Services	10,470
Data Center Costs	20,307
Depreciation	48,686
Dues and Subscriptions	208
Equipment Rent	43,246
General Transport Costs	105,284
Insurance	9,748
Interest Expense	24,847
Licenses and Permits	2,613
Marketing Expenses	18,439
Miscellaneous Expenses	4,385
Office Lease	20,843
Office Supplies	5,330
Subtotal	<u>\$ 320,480</u>

**GREENFLY NETWORKS, INC.**  
**dba Clearfly Communications**  
**Statement of Income (Continued)**  
**For the Eight Months Ended March 31, 2009**

**Operating Expenses (Continued)**

Subtotal Carried Forward	\$ 320,480
Payroll Expenses - Salaries and Wages	247,472
Payroll Expenses - Taxes and Benefits	53,951
Postage and Delivery	990
Professional Fees	4,201
Repairs and Maintenance	10,356
Supplies and Software	40,219
Telephone	10,014
Travel, Meals and Entertainment	33,916
Total Operating Expenses	<u>\$ 721,599</u>
<b>Loss From Operations</b>	<b>\$ (486,848)</b>
<b>Other Income (Expenses)</b>	
Other Income	4,752
<b>Net Loss Before Income Taxes</b>	<b>\$ (482,096)</b>
<b>Provision for Income Taxes</b>	<u>191,800</u>
<b>Net Loss</b>	<u><u>\$ (290,296)</u></u>

The accompanying notes are an integral part of these financial statements.



**GREENFLY NETWORKS, INC.**

dba Clearfly Communications

**Statement of Stockholders' Equity****For the Eight Months Ended March 31, 2009**

	<u>Common Stock</u>	<u>Accumulated Deficit</u>
<b>Balance - July 31, 2008</b>	\$ 47,852	\$ (413,233)
Issuance of Common Stock	1,753,835	-
Dividends Paid	-	-
Net Loss	-	(290,296)
<b>Balance - March 31, 2009</b>	<u>\$ 1,801,687</u>	<u>\$ (703,529)</u>

The accompanying notes are an integral part of these financial statements.

**GREENFLY NETWORKS, INC.**  
**dba Clearfly Communications**  
**Statement of Cash Flows**  
**For The Eight Months Ended March 31, 2009**

**Cash Flows From Operating Activities**

Net Loss	\$ (290,296)
Adjustments to Reconcile Net Loss to Net	
Cash Used in Operating Activities:	
Depreciation	48,686
Changes in Operating Assets and Liabilities:	
Accounts Receivable	2,067
Decrease in Deposits	3,985
Deferred Tax Asset	(209,000)
Accounts Payable and Accrued Expenses	23,995
Deferred Tax Liability	17,200
Net Cash Used in Operating Activities	<u>\$ (403,363)</u>

**Cash Flows From Investing Activities**

Purchase of Property and Equipment	\$ (13,995)
Receipts from Stock Subscription Receivable	510,074
Net Cash Provided by Investing Activities	<u>\$ 496,079</u>

**Cash Flows From Financing Activities**

Net Advances on Revolving Lines of Credit	\$ 2,891
Repayments on Long-Term Debt	(89,691)
Receipts from Issuance of Common Stock	3,687
Net Cash Provided by Financing Activities	<u>\$ (83,113)</u>

**Increase in Cash and Equivalents** \$ 9,603

**Cash and Equivalents - Beginning of Year** 3,179

**Cash and Equivalents - End of Year** \$ 12,782

**Supplemental Information**

Interest Paid	<u>\$ 22,510</u>
Income Taxes Paid	<u>\$ -</u>
Issuance of Capital Stock under Stock	
Subscription Agreement	<u>\$ 1,750,150</u>

The accompanying notes are an integral part of these financial statements.

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ISSUE DATE: TBD

EFFECTIVE DATE: TBD

ISSUED BY: Greenfly Networks Inc., dba Clearfly Communications  
222 N 32<sup>nd</sup> St. Suite 904  
Billings, MT 59101

## ARIZONA CC TARIFF NO. 1

**CHECK SHEET**

Pages of this tariff are effective as of the date shown at the bottom of the respective page(s). Original and revised pages as named below comprise all changes from the original tariff and are currently in effect as of the date on the bottom of this page. Pages of this tariff are effective as of the date shown at the bottom of the respective page(s). Original and revised pages as named below comprise all changes from the original tariff and are currently in effect as of the date on the bottom of this page.

	SHEET	REVISION		SHEET	REVISION
	1	Original		25	Original
	2	Original		26	Original
	3	Original		27	Original
	4	Original		28	Original
	5	Original		29	Original
	6	Original		30	Original
	7	Original		31	Original
	8	Original		32	Original
	9	Original		33	Original
	10	Original		34	Original
	11	Original		35	Original
	12	Original		36	Original
	13	Original		37	Original
	14	Original		38	Original
	15	Original		39	Original
	16	Original		40	Original
	17	Original			
	18	Original			
	19	Original			
	20	Original			
	21	Original			
	22	Original			
	23	Original			
	24	Original			

ISSUE DATE: TBD

EFFECTIVE DATE: TBD

ISSUED BY: Greenfly Networks Inc., dba Clearfly Communications  
 222 N 32<sup>nd</sup> St. Suite 904  
 Billings, MT 59101

**APPLICATION OF TARIFF**

This tariff sets forth the service offerings, rates, terms and conditions applicable to the furnishing of intrastate end-user local exchange communications services by Greenfly Networks, Inc, hereinafter referred to as the Company, to Customers within the state of Arizona. Greenfly Networks's services are furnished subject to the availability of facilities and subject to the terms and conditions set forth herein. This tariff is on file with the Arizona Corporation Commission.

ISSUE DATE: TBD

EFFECTIVE DATE: TBD

ISSUED BY: Greenfly Networks Inc., dba Clearfly Communications  
222 N 32<sup>nd</sup> St. Suite 904  
Billings, MT 59101

## ARIZONA CC TARIFF NO. 1

**TARIFF FORMAT**

- A. Page Numbering - Page numbers appear in the upper right corner of the page. Pages are numbered sequentially. However, new pages are occasionally added to the tariff. When a new page is added between pages already in effect, a decimal is added. For example, a new page added between pages 14 and 15 would be 14.1.
- B. Page Revision Numbers - Revision numbers also appear in the upper right corner of each page. These numbers are used to determine the most current page version on file with the Commission. For example, the 4th revised Page 14 cancels the 3rd revised Page 14. Because of various suspension periods, deferrals, etc., the most current page number on file with the Commission is not always the tariff page in effect. Consult the Check Sheet for the page currently in effect.
- C. Paragraph Numbering Sequence - There are nine levels of paragraph coding. Each level of coding is subservient to its next higher level:
- 2.
  - 2.1.
  - 2.1.1.
  - 2.1.1 .A.
  - 2.1.1 .A. 1.
  - 2.1.1 .A.1.(a).
  - 2.1.1 .A. 1 .(a).I.
  - 2.1.1 .A. 1 .(a).I.(i).
  - 2.1.1.A.1.(a).I.(i).(l).
- D. Check Sheets - When a tariff filing is made with the Commission, an updated Check Sheet accompanies the tariff filing. The Check Sheet lists the pages contained in the tariff, with a cross reference to the current revision number. When new pages are added, the Check Sheet is changed to reflect the revision. All revisions made in a given filing are designated by an asterisk (\*). There will be no other symbols used on this page if these are the only changes made to it (i.e., the format, etc. remain the same, just revised revision levels on some pages.) The tariff user should refer to the latest Check Sheet to find out if a particular page is the most current on file with the Commission.

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**SECTION 1.0 - DEFINITIONS**

**Access Line** - An arrangement from a local exchange telephone company or other common carrier, using either dedicated or switched access, which connects a Customer's location to Carrier's location or switching center.

**Account** - A Company accounting category containing up to two (2) residential local exchange access lines billed to the same Customer at the same address. The second or non-primary local exchange access line will share any call allowance of the primary local exchange access line. The second or non-primary local exchange access line therefore will not be provisioned to include a separate call allowance structure. No features are included with the second or non-primary local exchange access line.

**Account Codes** - Permits Centrex Stations and attendants to dial an account code number of up to eight digits. For use when placing calls over facilities arranged for Automatic Message Accounting (MA) recording. The account or project number must be input prior to dialing the called number.

**Advance Payment** - Part or all of a payment required before the **start** of service.

**Authorization Code** - A numerical code, one or more of which may be assigned to a Customer, to enable Carrier to identify the origin of service of the Customer so it may rate and bill the call. All authorization codes shall be the sole property of Carrier and no Customer shall have any property or other right or interest in the use of any particular authorization code. Automatic numbering identification (ANI) may be used as or in connection with the authorization code.

**Authorized User** - A person, firm or corporation authorized by the Customer to be an end-user of the service of the Customer.

**Automatic Numbering Identification (ANI)** - A type of signaling provided by a local exchange telephone company which automatically identifies the local exchange line from which a call originates.

**Commission** - Arizona Corporation Commission.

**Common Carrier** - An authorized company or entity providing telecommunications services to the public

**Company** - Greenfly Networks, LLC, the issuer of this tariff.

**Customer** - The person, firm or corporation that orders service and is responsible for the payment of charges and compliance with the terms and conditions of this tariff.

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**Codec:** (coder/decoder) a device or software application that encodes or decodes a signal, that is, converts binary signals transmitted on IP networks to/from analog signals generated or utilized by analog devices such as telephones.

**Customer Premises** - A location designated by the Customer for the purposes of connecting to the Company's services.

**Customer Terminal Equipment** - Terminal equipment provided by the Customer.

**Equal Access** - A form of dialed access provided by local exchange companies whereby interexchange calls dialed by the Customer are automatically routed to the Company's network. Presubscribed Customers may also route interexchange calls to the Company's network by dialing an access code supplied by the Company.

**Exchange Telephone Company or Telephone Company** - Denotes any individual, partnership, association, joint stock company, trust, or corporation authorized by the appropriate regulatory bodies to engage in providing public switched communication service throughout an exchange area, and between exchange areas within the LATA.

**Fax-to-email:** a data service that forwards faxes sent to a specific phone number into email messages and attachments, or converts outgoing email messages into faxes and sends them to the desired fax number.

**ICB** - Individual Case Basis.

**IP:** Internet Protocol

**IXC or Interexchange Carrier-** A long distance telecommunications services provider.

**Interruption** - The inability to complete calls due to equipment malfunctions or human errors. Interruption shall not include, and no allowance shall be given for service difficulties such as slow dial tone, circuits busy or other network and/or switching capability shortages. Nor shall Interruption include the failure of any service or facilities provided by a common carrier or other entity other than the Carrier. Any Interruption allowance provided within this Tariff by Carrier shall not apply where service is interrupted by the negligence or willful act of the Customer, or where the Carrier, pursuant to the terms of this Tariff, terminates service because of non-payment of bills, unlawful or improper use of the Carrier's facilities or service, or any other reason covered by this Tariff or by applicable law.

**LATA** - A Local Access and Transport Area established pursuant to the Modification of Final Judgment entered by the United States District Court for the District of Columbia in Civil Action No. 82-0192; or any other geographic area designated as a LATA in the National Exchange Carrier Association, Inc. Tariff F.C.C. No. 4, or its successor tariff(s).

**LEC** - Local Exchange Company refers to the dominant, monopoly local telephone company in the area also served by the Company.

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**Deposit** - Refers to a cash or equivalent of cash security held as a guarantee for payment of the charges.

**End Office** - The LEC switching system office or serving wire center where Customer station loops are terminated for purposes of interconnection to each other and/or to trunks.

**Monthly Recurring Charges** - The monthly charges to the Customer for services, facilities and equipment, which continue for the agreed upon duration of the service.

**MOU** - Minutes of Use.

**NECA** - National Exchange Carriers Association.

**Non-Recurring Charge ("NRC")** - The initial charge, usually assessed on a one-time basis, to initiate and establish service.

**PBX** - Private Branch Exchange

**PIN** - Personal Identification Number. See Authorization Code.

**Point of Presence ("POP")** - Point of Presence

**Recurring Charges** - Monthly charges to the Customer for services, and equipment, which continues for the agreed upon duration of the service.

**Service** - Any means of service offered herein or any combination thereof.

**Service Order** - The written request for Company services executed by the Customer and the Company in the format devised by the Company. The signing of a Service Order Form by the Customer and acceptance by the Company initiates the respective obligations of the parties as set forth therein and pursuant to this tariff.

**Serving Wire Center** - A specified geographic point from which the vertical and horizontal coordinate is used in calculation of airline mileage.

**Shared Inbound Calls** - Refers to calls that are terminated via the Customer's Company-provided local exchange line.

**SIP:** (Session initiation Protocol) an application-layer control protocol used in IP Telephony to establish sessions for services such as audio/videoconferencing, interactive gaming, call forwarding etc.

**Station** - The network control signaling unit and any other equipment provided at the Customer's premises which enables the Customer to establish communications connections and to effect communications through such connections.

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**Subscriber** - The person, firm, partnership, corporation, or other entity who orders telecommunications service from Greenfly Networks. Service may be ordered by, or on behalf of, those who own, lease or otherwise manage the pay telephone, PBX, or other switch vehicle from which an End User places a call utilizing the services of the Company.

**Switched Access Origination Termination** - Where access between the Customer and the interexchange carrier is provided on local exchange company Feature Group circuits and the connection to the Customer is a LED-provided business or residential access line. The cost of switched Feature Group access is billed to the interexchange carrier.

**Terminal Equipment** - Any telecommunications equipment other than the transmission or receiving equipment installed at a Company location.

**Usage Charges** - Charges for minutes or messages traversing over local exchange facilities.

**User or End User** - A Customer, Joint User, or any other person authorized by a Customer to use service provided under this tariff.

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## ARIZONA CC TARIFF NO. 1

**2.1 Undertaking of the Company****2.1.1 Scope**

The Company undertakes to furnish communications service pursuant to the terms of this tariff in connection with one-way and/or two-way information transmission between points within the state of Arizona. The Company is responsible under this tariff only for the services and facilities provided hereunder, and it assumes no responsibility for any service provided by any other entity that purchases access to the Company network in order to originate or terminate its own services, or to communicate with its own customers.

**2.1.2 Shortage of Equipment or Facilities**

2.1.2.A. The Company reserves the right to limit or to allocate the use of existing facilities, or of additional facilities offered by the Company, when necessary because of lack of facilities, or due to some other cause beyond the Company's control.

2.1.2.B. The furnishing of service under this tariff is subject to the availability on a continuing basis of all the necessary facilities and is limited to the capacity of the Company's facilities as well as facilities the Company may obtain from other carriers to furnish service from time to time as required at the sole discretion of the Company.

**2.1.3 Terms and Conditions**

2.1.3.A. Service is provided on the basis of a minimum period of at least thirty (30) days, 24- hours per day. For the purpose of computing charges in this tariff, a month is considered to have 30 days.

2.1.3.B. Except as otherwise stated in this tariff, Customers may be required to enter into written service orders which shall contain or reference a specific description of the service ordered, the rates to be charged, the duration of the services, and the terms and conditions in this tariff. Customers will also be required to execute any other documents as may be reasonably requested by the Company.

2.1.3.C. At the expiration of the initial term specified in each Service Order, or in any extension thereof, service shall continue on a month-to-month basis at the then current rates unless terminated by either party upon notice. Any termination shall not relieve the Customer of its obligation to pay any charges incurred under the service order and this tariff prior to termination. The rights and obligations which by their nature extend beyond the termination of the term of the service order shall survive such termination.

2.1.3.D. In any action between the parties to enforce any provision of this tariff, the prevailing party shall be entitled to recover its legal fees and court costs from the non-prevailing party in addition to other relief a court may award.

2.1.3.E. Service may be terminated upon written notice to the Customer if:

2.1.3.E.1 the Customer is using the service in violation of this tariff; or

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2.1.3.E.2 the Customer is using the service in violation of the law.

2.1.3.F. This tariff shall be interpreted and governed by the laws of the state of Arizona regardless of its choice of laws provision.

2.1.3.G. Any other Telephone Company may not interfere with the right of any person or entity to obtain service directly from the Company. No person or entity shall be required to make any payment, incur any penalty, monetary or otherwise, or purchase any services in order to have the right to obtain service directly from the Company.

2.1.3.H. To the extent that either the Company or any other telephone company exercises control over available cable pairs, conduit, duct space, raceways, or other facilities needed by the other to reach a person or entity, the party exercising such control shall make them available to the other on terms equivalent to those under which the Company makes similar facilities under its control available to its customers. At the reasonable request of either party, the Company and the other telephone company shall join the attempt to obtain from the owner of the property access for the other party to serve a person or entity.

**2.1.4 Limitations on Liability**

2.1.4.A. Except as otherwise stated in this section, the liability of the Company for damages arising out of either: (1) the furnishing of its services, including but not limited to mistakes, omissions, interruptions, delays, or errors, or other defects, representations, or use of these services or (2) the failure to furnish its service, whether caused by acts or omission, shall be limited to the extension of allowances to the Customer for interruptions in service as set forth in Section 2.6.

2.1.4.B. Except for the extension of allowances to the Customer for interruptions in service as set forth in Section 2.6, the Company shall not be liable to a Customer or third party for any direct, indirect, special, incidental, reliance, consequential, exemplary or punitive damages, including, but not limited to, loss of revenue or profits, for any reason whatsoever, including, but not limited to, any act or omission, failure to perform, delay, interruption, failure to provide any service or any failure in or breakdown of facilities associated with the service.

2.1.4.C. The liability of the Company for errors in billing that result in overpayment by the Customer shall be limited to a credit equal to the dollar amount erroneously billed or, in the event that payment has been made and service has been discontinued, to a refund of the amount erroneously billed.

2.1.4.D. The Company shall be indemnified and saved harmless by the Customer from and against all loss, liability, damage and expense, including reasonable counsel fees, due to:

2.1.4.D.1 Any act or omission of (a) the Customer, (b) any other entity from service, equipment or facilities for use in conjunction with services or facilities provided by the Company; or (c) common carriers or

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- warehousemen, except as contracted by the Company;
- 2.1.4.D.2 Any delay or failure of performance or equipment due to causes beyond the Company's control, including but not limited to, acts of God, fires, floods, earthquakes, hurricanes, or other catastrophes; national emergencies, insurrections, riots, wars or other civil commotions; strikes, lockouts, work stoppages or other labor difficulties; criminal actions taken against the Company; unavailability, failure or malfunction of equipment or facilities provided by the Customer or third parties; and any law, order, regulation or other action of any governing authority or agency thereof;
- 2.1.4.D.3 Any unlawful or unauthorized use of the Company's facilities and services;
- 2.1.4.D.4 Libel, slander, invasion of privacy or infringement of patents, trade secrets, or copyrights arising from or in connection with the material transmitted by means of Company-provided facilities or services; or by means of the combination of Company-provided facilities or services;
- 2.1.4.D.5 Breach in the privacy or security of communications transmitted over the Company's facilities;
- 2.1.4.D.6 Changes in any of the facilities, operations or procedures of the Company that render any equipment, facilities or services provided by the Customer obsolete, or require modification or alteration of such equipment, facilities or services, or otherwise affect their use or performance, except where reasonable notice is required by the Company and is not provided to the Customer, in which event the Company's liability is limited as set forth in paragraph A. of this Subsection 2.1.4.
- 2.1.4.D.7 Defacement of or damage to Customer premises resulting from the furnishing of services or equipment on such premises or the installation or removal thereof;
- 2.1.4.D.8 Injury to property or injury or death to persons, including claims for payments made under Workers' Compensation law or under any plan for employee disability or death benefits, arising out of, or caused by, any act or omission of the Customer, or the construction, installation, maintenance, presence, use or removal of the Customer's facilities or equipment connected, or to be connected to the Company's facilities;
- 2.1.4.D.9 Any non completion of calls due to network busy conditions;
- 2.1.4.D.10 Any calls not actually attempted to be completed during any period that service is unavailable;

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- 2.1.4.D.11 And any other claim resulting from any act or omission of the Customer or patron(s) of the Customer relating to the use of the Company's services or facilities.
- 2.1.4.E. The Company does not guarantee nor make any warranty with respect to installations provided by it for use in an explosive atmosphere.
- 2.1.4.F. The Company makes no warranties or representations, EXPRESS OR IMPLIED, either in fact or by operation of law, statutory or otherwise, including warranties of merchantability or fitness for a particular use, except those expressly set forth herein.
- 2.1.4.G. Failure by the Company to assert its rights pursuant to one provision of this rate sheet does not preclude the Company from asserting its rights under other provisions.
- 2.1.4.H. Directory Errors - In the absence of gross negligence or willful misconduct, no liability for damages arising from errors or mistakes in or omissions of directory listings, or errors or mistakes in or omissions of listing obtainable from the directory assistance operator, including errors in the reporting thereof, shall attach to the Company. An allowance for errors or mistakes in or omissions of published directory listings or for errors or mistakes in or omissions of listing obtainable from the directory assistance operator shall be at the monthly tariff rate for each listing, or in the case of a free or no-charge directory listing, credit shall equal two times the monthly tariff rate for an additional listing, for the life of the directory or the charge period during which the error, mistake or omission occurs.
- 2.1.4.1. With respect to Emergency Number 911 Service:
- 2.1.4.1.1 This service is offered solely as an aid in handling assistance calls in connection with fire, police and other emergencies. The Company is not responsible for any losses, claims, demands, suits or any liability whatsoever, whether suffered, made instituted or asserted by the Customer or by any other party or person for any personal injury or death of any person or persons, and for any loss, damage or destruction of any property, whether owned by the Customer or others, caused or claimed to have been caused by: (1) mistakes, omissions, interruptions, delays, errors or other defects in the provision of service, or (2) installation, operation, failure to operate, maintenance, removal, presence, condition, local or use of any equipment and facilities furnishing this service.
- 2.1.4.1.2 Neither is the Company responsible for any infringement, nor invasion of the right of privacy of any person or persons, caused or claimed to have been caused directly or indirectly, by the installation, operation, failure to operate, maintenance, removal, presence, condition, occasion

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or use of emergency 911 service features and the equipment associated therewith, or by any services furnished by the Company, including, but not limited to the identification of the telephone number, address or name associated with the telephone used by the party or parties accessing emergency 911 service, and which arise out of the negligence or other wrongful act of the Company, the Customer, its users, agencies or municipalities, or the employees or agents of any one of them.

2.1.4.1.3 When a Customer with a non published telephone number, as defined herein, places a call to the emergency 911 service, the Company will release the name and address of the calling party, where such information can be determined, to the appropriate local governmental authority responsible for emergency 911 service upon request of such governmental authority. By subscribing to service under this rate sheet, the Customer acknowledges and agrees with the release of information as described above.

2.1.5 Notification of Service-Affecting Activities. Company will provide the Customer reasonable notification of service-affecting activities that may occur in normal operation of its business. Such activities may include, but are not limited to, equipment or facilities additions, removals or rearrangements and routine preventative maintenance. Generally, such activities are not specific to an individual Customer but affect many Customers' services. No specific advance notification period is applicable to all service activities. The Company will work cooperatively with the Customer to determine the reasonable notification requirements. With some emergency or unplanned service-affecting conditions, such as an outage resulting from cable damage, notification to the Customer may not be possible.

2.1.6 Provision of Equipment and Facilities

2.1.6.A. The Company shall use reasonable efforts to make available services to a Customer on or before a particular date, subject to the provisions of and compliance by the Customer with, the regulations contained in this tariff. The Company does not guarantee availability by any such date and shall not be liable for any delays in commencing service to any Customer.

2.1.6.B. The Company shall use reasonable efforts to maintain only the facilities and equipment that it furnishes to the Customer. The Customer may not, nor may the Customer permit others to, rearrange, disconnect, remove, attempt to repair, or otherwise interfere with any of the facilities or equipment installed by the Company, except upon the written consent of the Company.

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- 2.1.6.C. The Company may substitute, change or rearrange any equipment or facility at any time and from time to time, but shall not thereby alter the technical parameters of the service provided the Customer.
- 2.1.6.D. Equipment the Company provides or installs at the Customer Premises for use in connection with the services the Company offers shall not be used for any purpose other than that for which it was provided.
- 2.1.6.E. The Customer shall be responsible for the payment of service charges as set forth herein for visits by the Company's agents or employees to the Premises of the Customer when the service difficulty or trouble report results from the use of equipment or facilities provided by any party other than the Company, including but not limited to the Customer.
- 2.1.6.F. The Company shall not be responsible for the installation, operation, or maintenance of any Customer-provided communications equipment. Where such equipment is connected to the facilities furnished pursuant to this tariff, the responsibility of the Company shall be limited to the furnishing of facilities offered under this tariff and to the maintenance and operation of such facilities. Subject to this responsibility, the Company shall not be responsible for:
- (1) the transmission of signals by Customer-provided equipment or for the quality of, or defects in, such transmission; or
  - (2) the reception of signals by Customer-provided equipment.
- 2.1.7 Non-routine Installation. At the Customer's request, installation and/or maintenance may be performed outside the Company's regular business hours or in hazardous locations. In such cases, charges based on cost of the actual labor, material, or other costs incurred by or charged to the Company will apply. If installation is started during regular business hours but, at the Customer's request, extends beyond regular business hours into time periods including, but not limited to, weekends, holidays, and/or night hours, additional charges may apply. Special Construction Subject to the agreement of the Company and to all of the regulations contained in this tariff, special construction of facilities may be undertaken on a reasonable efforts basis at the request of the Customer. Special construction is that construction undertaken:
- A where facilities are not presently available, and there is no other requirement for the facilities so constructed;
  - B of a type other than that which the Company would normally utilize in the furnishing of its services;
  - C over a route other than that which the Company would normally utilize in the furnishing of its services;

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- D in a quantity greater than that which the Company would normally construct;
- E. on an expedited basis;
- F on a temporary basis until permanent facilities are available;
- G involving abnormal costs; or
- H in advance of its normal construction.

2.1.3 Ownership of Facilities: Title to all facilities provided in accordance with this rate sheet remains in the Company, its partners, agents, contractors or suppliers. on a temporary basis until permanent facilities are available; in advance of its normal construction.

## 2.2 Prohibited Uses

- 2.2.1 The services the Company offers shall not be used for any unlawful purpose or for any use as to which the Customer has not obtained all required governmental approvals, authorizations, licenses, consents and permits.
- 2.2.2 The Company may require applicants for service who intend to use the Company's offerings for resale and for shared use to file a letter with the Company confirming that their use of the Company's offerings complies with relevant laws and Commission regulations, policies, orders, and decisions.
- 2.2.3 The Company may block any signals being transmitted over its Network by Customers which cause interference to the Company or other users. Customer shall be relieved of all obligations to make payments for charges relating to any blocked Service and shall indemnify the Company for any claim, judgment or liability resulting from such blockage.
- 2.2.4 A customer, joint user, or authorized user may not assign, or transfer in any manner, the service or any rights associated with the service without the written consent of the Company. The Company will permit a Customer to transfer its existing service to another entity if the existing Customer has paid all charges owed to the Company for regulated communications services. Such a transfer will be treated as a disconnection of existing service and installation of new service, and non-recurring installation charges as stated in this tariff will apply.

## 2.3 Obligations of the Customer

### 2.3.1 General

The Customer is responsible for making proper application for service; placing any necessary order, complying with tariff regulations; payment of charges for services provided. Specific Customer responsibilities include, but are not limited to the following:

- A. the payment of all applicable charges pursuant to this tariff;

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- B. damage to or loss of the Company's facilities or equipment caused by the acts or omissions of the Customer; or the noncompliance by the Customer, with these regulations; or by fire or theft or other casualty on the Customer Premises, unless caused by the negligence or willful misconduct of the employees or agents of the Company;
- C. providing at no charge, as specified from time to time by the Company, any needed personnel, equipment space and power to operate Company facilities and equipment installed on the premises of the Customer, and the level of heating and air conditioning necessary to maintain the proper operating environment on such premises;
- D. obtaining, maintaining, and otherwise having full responsibility for all rights-of-way and conduits necessary for installation of fiber optic cable and associated equipment used to provide Communication Services to the Customer from the cable building entrance or property line to the location of the equipment space described in 2.3.1(C.) Any and all costs associated with obtaining and maintaining the rights-of-way described herein, including the costs of altering the structure to permit installation of the Company provided facilities, shall be borne entirely by, or may be charged by the Company to, the Customer. The Company may require the Customer to demonstrate its compliance with this section prior to accepting an order for service;
- E. providing a safe place to work and complying with all laws and regulations regarding the working conditions on the premises at which Company employees and agents shall be installing or maintaining the Company's facilities and equipment. The Customer may be required to install and maintain Company facilities and equipment within a hazardous area if, in the Company's opinion, injury or damage to the Company's employees or property might result from installation or maintenance by the Company. The Customer shall be responsible for identifying, monitoring, removing and disposing of any hazardous material (e.g. asbestos) prior to any construction or installation work;
- F. complying with all laws and regulations applicable to, and obtaining all consents, approvals, licenses and permits as may be required with respect to, the location of Company facilities and equipment in any Customer premises or the rights-of-way for which Customer is responsible under Section 2.3.1D.; and granting or obtaining permission for Company agents or employees to enter the premises of the Customer at any time for the purpose of installing, inspecting, maintaining, repairing, or upon termination of service as stated herein, removing the facilities or equipment of the Company;
- G. not creating, or allowing to be placed, any liens or other encumbrances on the Company's equipment or facilities; and
- H. making Company facilities and equipment available periodically for maintenance purposes at a time agreeable to both the Company and the

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Customer. No allowance will be made for the period during which service is interrupted for such purposes.

**2.3.2 Liability of the Customer**

- A. The Customer will be liable for damages to the facilities of the Company and for all incidental and consequential damages caused by the negligent or intentional acts or omissions of the Customer, its officers, employees, agents, invites, or contractors where such acts or omissions are not the direct result of the Company's negligence or intentional misconduct.
- B. To the extent caused by any negligent or intentional act of the Customer as described in A., preceding, the Customer shall indemnify, defend and hold harmless the Company from and against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorneys' fees, for
  - (1) any loss, destruction or damage to property of any third party, and
  - (2) any liability incurred by the Company to any third party pursuant to this or any other rate sheet of the Company, or otherwise, for any interruption of, interference to, or other defect in any service provided by the Company to such third party.
- C. The Customer shall not assert any claim against any other Customer or user of the Company's services for damages resulting in whole or in part from or arising in connection with the furnishing of service under this rate sheet including but not limited to mistakes, omissions, interruptions, delays, errors or other defects or misrepresentations, whether or not such other Customer or user contributed in any way to the occurrence of the damages, unless such damages were caused solely by the negligent or intentional act or omission of the other Customer or user and not by any act or omission of the Company. Nothing in this rate sheet is intended either to limit or to expand Customer's right to assert any claims against third parties for damages of any nature other than those described in the preceding sentence.

**2.4 Customer Equipment and Channels****2.4.1 General**

The Company's services are designed primarily for the transmission of voice-grade telephonic signals, except as otherwise stated in this tariff. A User may transmit any form of signal that is compatible with the Company's equipment, but the Company does not guarantee that its services will be suitable for purposes other than voice-grade telephonic communication except as specifically stated in this tariff.

**2.4.2 Station Equipment**

- A. Terminal equipment on the User's Premises and the electric power consumed by such equipment shall be provided by and maintained at the expense of the User.

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The User is responsible for the provision of wiring or cable to connect its terminal equipment to the Company Point of Connection.

- B. The Customer is responsible for ensuring that Customer-provided equipment connected to Company equipment and facilities is compatible with such equipment and facilities. The magnitude and character of the voltages and currents impressed on Company provided equipment and wiring by the connection, operation, or maintenance of such equipment and wiring shall be such as not to cause damage to the Company-provided equipment and wiring or injury to the Company's employees or to other persons. Any additional protective equipment required to prevent such damage or injury shall be provided by the Company at the Customer's expense, subject to prior Customer approval of the equipment expense.

**2.4.3 Interconnection of Facilities**

- A. Any special interface equipment necessary to achieve compatibility between the facilities and equipment of the Company used for furnishing Communication Services and the channels, facilities, or equipment of others shall be provided at the Customer's expense.
- B. Communication Services may be connected to the services or facilities of other communications carriers only when authorized by, and in accordance with, the terms and conditions of the tariffs of the other communications carriers that are applicable to such connections.
- C. Facilities furnished under this tariff may be connected to Customer-provided terminal equipment in accordance with the provisions of this tariff. All such terminal equipment shall be registered by the Federal Communications Commission pursuant to Part 68 of Title 47, Code of Federal Regulations; and all User-provided wiring shall be installed and maintained in compliance with those regulations.
- D. Users may interconnect communications facilities that are used in whole or in part for interstate communications to services provided under this tariff only to the extent that the user is an "End User", as defined in Section 69.2(m), Title 47, Code of Federal Regulations (1992 edition).

**2.4.4 Inspections**

- A. Upon suitable notification to the Customer, and at a reasonable time, the Company may make such tests and inspections as may be necessary to determine that the Customer is complying with the requirements set forth in Section 2.4.2A. for the installation, operation, and maintenance of Customer-provided facilities, equipment, and wiring in the connection of Customer-provided facilities and equipment to Company-owned facilities and equipment.
- B. If the protective requirements for Customer-provided equipment are not being complied with, the Company may take such action as it deems necessary to

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protect its facilities, equipment, and personnel. The Company will notify the Customer promptly if there is any need for further corrective action. Within ten days of receiving this notice, the Customer must take this corrective action and notify the Company of the action taken. If the Customer fails to do this, the Company may take whatever additional action is deemed necessary, including the suspension of service, to protect its facilities, equipment and personnel from harm.

**2.5 Payment Arrangements****2.5.1 Payment for Service**

The Customer is responsible for the payment of all charges for facilities and services furnished by the Company to the Customer and to all Authorized Users by the Customer, regardless of whether those services are used by the Customer itself or are resold to or shared with other persons. The Customer is responsible for payment of any sales, use, gross receipts, excise, access or other local, state, federal and 911 taxes, charges or surcharges (however designated) (excluding taxes on Company's net income) imposed on or based upon the provision, sale or use of Network Services.

**2.5.2 Billing and Collection of Charges**

The Customer is responsible for payment of all charges incurred by the Customer or other Authorized Users for services and facilities furnished to the Customer by the Company.

- A. Nonrecurring charges are due and payable within thirty (15) days after the invoice date, unless otherwise agreed to in advance.
- B. The Company shall present invoices for recurring charges monthly to the Customer, in advance of the month in which service is provided, and Recurring Charges shall be due and payable within thirty (15) days after the invoice date. When billing is based on customer usage, charges will be billed monthly for the preceding billing periods.
- C. When service does not begin on the first day of the month, or end on the last day of the month, the charge for the fraction of the month in which service was furnished will be calculated on a pro rata basis. For this purpose, every month is considered to have thirty (30) days.
- D. Billing of the Customer by the Company will begin on the Service Commencement Date, which is the first day following the date on which the Company notifies the Customer that the service or facility is available for use, except that the Service Commencement Date may be postponed by mutual agreement of the parties, or if the service or facility does not conform to standards set forth in this tariff or the Service Order. Billing accrues through and includes the day that the service, circuit, arrangement or component is discontinued.
- E. If any portion of the payment is not received by the Company, or if any portion of the payment is received by the Company in funds that are not immediately

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available, within twenty (30) days of the mail date on the bill, then a late payment penalty shall be due the Company. The late payment penalty shall be that portion of the payment not received by the date due minus any charges billed as local taxes multiplied by 1.0%.

- F. The Customer will be assessed a maximum charge of thirty-five (\$35.00) for each check or other payment type submitted by the Customer to the Company that a bank or financial institution refuses to honor. See Section 9 for current charges.
- G. If service is disconnected by the Company in accordance with Section 2.5.6 following and later restored, restoration of service will be subject to all applicable installation charges.

**2.5.3 Disputed Bills**

- A. In the event that a billing dispute occurs concerning any charges billed to the Customer by the Company, the Company may require the Customer to pay the undisputed portion of the bill to avoid discontinuance of service for non-payment. The Customer must submit a documented claim for the disputed amount. The Customer will submit all documentation as may reasonably be required to support the claim. All claims must be submitted to the Company within 90 days of receipt of billing for those services. If the Customer does not submit a claim as stated above, the Customer waives all rights to filing a claim thereafter.
- B. Unless disputed the invoice shall be deemed to be correct and payable in full by the Customer. If the Customer is unable to resolve any dispute with the Company, then the Customer may file a complaint with the Arizona Corporation Commission, 1200 West Washington Street, Phoenix, Arizona 85007.
- C. If the dispute is resolved in favor of the Customer and the Customer has withheld the disputed amount, no interest, credits or penalties will apply.

**2.5.4 Advance Payments**

The Company does not collect advance payments.

**2.5.5 Deposits**

The Company does not collect deposits.

**2.5.5 Reserved For Future Use****2.5.6 Discontinuance of Service**

- A. Upon nonpayment of any amounts owing to the Company, the Company may, by giving five (5) days written notice to the Customer, discontinue or suspend service without incurring any liability.
- B. Upon violation of any of the other material terms or conditions for furnishing service the Company may, by giving five (5) days written notice to the

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Customer, discontinue or suspend service without incurring any liability if such violation continues during that period.

- C. Upon condemnation of any material portion of the facilities used by the Company to provide service to a Customer or if a casualty renders all or any material portion of such facilities inoperable beyond feasible repair, the Company, by notice to the Customer, may discontinue or suspend service without incurring any liability.
- D. Upon the Customer's insolvency, assignment for the benefit of creditors, filing for bankruptcy or reorganization, or failing to discharge an involuntary petition within the time permitted by law, the Company may immediately discontinue or suspend service without incurring any liability.
- E. Upon any governmental prohibition or required alteration of the services to be provided or any violation of an applicable law or regulation, the Company may immediately discontinue service without incurring any liability.
- F. In the event of fraudulent use of the Company's network, the Company will discontinue service without notice and/or seek legal recourse to recover all costs involved in enforcement of this provision.
- G. Upon the Company's discontinuance of service to the Customer under Section 2.5.6 A. or 2.5.6 B., the Company, in addition to all other remedies that may be available to the Company at law or in equity or under any other provision of this tariff, may declare all future monthly and other charges that would have been payable by the Customer during the remainder of the term for which such services would have otherwise been provided to the Customer to be immediately due and payable (discounted to present value at six percent).
- H. Without notice in the event of Customer use of equipment or services in such a manner as to adversely affect the Company's service to others.
- I. Without notice in the event of tampering with the equipment or services furnished by the Company.

**2.5.7 Cancellation of Application for Service**

- A. Applications for service cannot be canceled without the Company's agreement. Where the Company permits a Customer to cancel an application for service prior to the start of service or prior to any special construction, no charges will be imposed except for those specified below.
- B. Where, prior to cancellation by the Customer, the Company incurs any expenses in installing the service or in preparing to install the service that it otherwise would not have incurred, a charge equal to the costs incurred by the Company, less net salvage, shall apply, but in no case shall this charge exceed the sum of the charge for the minimum period of services ordered, including installation charges, and all charges others levy against the Company that would have been

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chargeable to the Customer had service commenced (all discounted to present value at six percent).

- C. Where the Company incurs any expense in connection with special construction, or where special arrangements of facilities or equipment have begun, before the Company receives a cancellation notice, a charge equal to the costs incurred by the Company, less net salvage, applies. In such cases, the charge will be based on such elements as the cost of the equipment, facilities, and material, the cost of installation, engineering, labor, and supervision, general and administrative expense, other disbursements, depreciation, maintenance, taxes, provision for return on investment, and any other costs associated with the special construction or arrangements.
- D. The special charges described in 2.5.7 A. through 2.5.7 C. will be calculated and applied on a case-by-case basis.

**2.5.8 Changes in Service Requested**

If the Customer makes or requests material changes in circuit engineering, equipment specifications, service parameters, premises locations, or otherwise materially modifies any provision of the application for service, the Customer's installation fee shall be adjusted accordingly.

**2.6 Allowances for Interruptions in Service**

Interruptions in service that are not due to the negligence of, or noncompliance with the provisions of this tariff by, the Customer or the operation or malfunction of the facilities, power or equipment provided by the Customer, will be credited to the Customer as set forth in 2.6.1 for the part of the service that the interruption affects.

**2.6.1 General**

- A. A credit allowance will be given when service is interrupted, except as specified below. A service is interrupted when it becomes inoperative to the Customer, e.g., the Customer is unable to transmit or receive, because of a failure of a component furnished by the Company under this rate sheet.
- B. An interruption period begins when the Customer reports a service, facility or circuit to be inoperative and, if necessary, releases it for testing and repair. An interruption period ends when the service, facility or circuit is operative.
- C. If the Customer reports a service, facility or circuit to be interrupted but declines to release it for testing and repair, or refuses access to its premises for test and repair by the Company, the service, facility or circuit is considered to be impaired but not interrupted. No credit allowances will be made for a service, facility or circuit considered by the Company to be impaired.
- D. The Customer shall be responsible for the payment of service charges as set forth herein for visits by the Company's agents or employees to the premises of the Customer when the service difficulty or trouble report results from the use of

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equipment or facilities provided by any party other than the Company, including but not limited to the Customer.

**2.6.2 Limitations of Allowances**

No credit allowance will be made for any interruption in service:

- A. Due to the negligence of or noncompliance with the provisions of this rate sheet by any person or entity other than the Company, including but not limited to the Customer;
- B. Due to the failure of power, equipment, systems, connections or services not provided by the Company;
- C. Due to circumstances or causes beyond the reasonable control of the Company;
- D. During any period in which the Company is not given full and free access to its facilities and equipment for the purposes of investigating and correcting interruptions;
- E. A service will not be deemed to be interrupted if a Customer continues to voluntarily make use of such service. If the service is interrupted, the Customer can get a service credit, use another means of communications provided by the Company (pursuant to Section 2.6.3), or utilize another service provider;
- F. During any period when the Customer has released service to the Company for maintenance purposes or for implementation of a Customer order for a change in service arrangements;
- G. That occurs or continues due to the Customer's failure to authorize replacement of any element of special construction; and
- H. That was not reported to the Company within thirty (30) days of the date that service was affected.

**2.6.3 Use of Another Means of Communications**

If the Customer elects to use another means of communications during the period of interruption, the Customer must pay the charges for the alternative service used.

**2.6.4 Application of Credits for Interruptions in Service**

- A. Credits for interruptions in service that is provided and billed on a flat rate basis for a minimum period of at least one month, beginning on the date that billing becomes effective, shall in no event exceed an amount equivalent to the proportionate charge to the Customer for the period of service during which the event that gave rise to the claim for a credit occurred. A credit allowance is applied on a pro rata basis against the rates specified hereunder and is dependent upon the length of the interruption. Only those facilities on the interrupted portion of the circuit will receive a credit.

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- B. For calculating credit allowances, every month is considered to have thirty (30) days.
- C. A credit allowance will be given for interruptions of thirty (30) minutes or more. Two or more interruptions of fifteen (15) minutes or more during any one 24-hour period shall be combined into one cumulative interruption.

**2.6.5 Cancellation For Service Interruption**

Cancellation or termination for service interruption is permitted only if any circuit experiences a single continuous outage of 8 hours or more or cumulative service credits equaling 16 hours in a continuous 12-month period. The right to cancel service under this provision applies only to the single circuit that has been subject to the outage or cumulative service credits.

**2.7 Use of Customer's Service by Others****2.7.1 Joint Use Arrangements**

Joint use arrangements will be permitted for all services provided under this tariff. From each joint use arrangement, one member will be designated as the Customer responsible for the manner in which the joint use of the service will be allocated. The Company will accept orders to start, rearrange, relocate, or discontinue service only from the designated Customer. Without affecting the Customer's ultimate responsibility for payment of all charges for the service, each joint user shall be responsible for the payment of the charges billed to it.

**2.8 Cancellation of Service/Termination Liability**

If a Customer cancels a Service Order or terminates services before the completion of the term for any reason whatsoever other than a service interruption (as defined in Section 2.6.1 above), the Customer agrees to pay to the Company termination liability charges, as defined below. These charges shall become due as of the effective date of the cancellation or termination and be payable within the period, set forth in Section 2.5.2.

**2.8.1 Termination Liability**

The Customer's termination liability for cancellation of service shall be equal to:

- A. all unpaid Non-Recurring charges reasonably expended by the Company to establish service to the Customer; plus
- B. any disconnection, early cancellation or termination charges reasonably incurred and paid to third parties by the Company on behalf of the Customer; plus
- C. all Recurring Charges specified in the applicable Service Order Tariff for the balance of the then current term;

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**2.9 Transfers and Assignments**

Neither the Company nor the Customer may assign or transfer its rights or duties in connection with the services and facilities provided by the Company without the written consent of the other party, except that the Company may assign its rights and duties:

- A to any subsidiary, parent company or affiliate of the Company; or
- B pursuant to any sale or transfer of substantially all the assets of the Company; or
- C pursuant to any financing, merger or reorganization of the Company.

**2.10 Customer Liability for Unauthorized Use of the Network**

Unauthorized use of the network occurs when a person or entity that does not have actual, apparent, or implied authority to use the network, obtains the Company's services provided under this rate sheet.

**2.11 Notices and Communications**

- 2.11.1 The Customer shall designate on the Service Order an address to which the Company shall mail or deliver all notices and other communications,
- 2.11.2 The Customer may also designate an email address to which the Company's electronic bills for service shall be sent. Customer may also designate on the Service Order to receive hard-copy copies of the bills and agrees to pay the applicable monthly rate for paper invoices.
- 2.11.3 The Company shall designate on the Service Order an address to which the Customer shall mail or deliver all notices and other communications, except that Company may designate a separate address on each bill for service to which the Customer shall mail payment on that bill.
- 2.11.4 Except as otherwise stated in this tariff, all notices or other communications required to be given pursuant to this tariff will be in writing. Notices and other communications of either party, and all bills mailed by the Company, shall be presumed to have been delivered to the other party on the third business day following placement of the notice, communication or bill with the U.S. Mail or a private delivery service, prepaid and properly addressed, or when actually received or refused by the addressee, whichever occurs first. Electronic bills emailed to the designated email address (section 2.11.2) shall be presumed to have been delivered in absence of receiving an email Failed Delivery Notification.
- 2.11.5 The Company or the Customer shall advise the other party of any changes to the addresses designated for notices, other communications or billing, by following the procedures for giving notice set forth herein.

**2.12 Taxes, Fees and Surcharges**

The Company reserves the right to bill any and all applicable taxes, fees and surcharges in addition to normal rates and charges for services provided to the Customer. Taxes and fees include, but are not limited to: Federal Excise Tax, State Sales Tax, Municipal Tax, and Gross Receipts Tax. Unless otherwise specified in this tariff, such taxes, fees and

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surcharges are in addition to rates as quoted in this tariff and will be itemized separately on Customer invoices.

**2.12.1 Arizona Universal Service Fund (AUSF)**

In addition to all other taxes and fees that are listed herein or passed through in the normal course of business (e.g. sales tax), the Company shall also add an amount to be collected to each bill for recovery of the Arizona Universal Service Fund (AUSF). Towards the ultimate goal that basic service be available and affordable to all citizens of the state, the Arizona Corporation Commission has created support mechanisms to assist in the provision of such service in high-cost areas. Pursuant to Arizona Administrative Code, R14-2, Article 12, the Rule directs that the surcharge will be levied on all telecommunications service purchased by end users. The Arizona Universal Service Fund (AUSF) surcharge will be the amount set forth in the Arizona Administrative Code, R14-2, Article 12. The percentage and amounts set forth will be subject to periodic adjustment by the Company.

**2.13 Miscellaneous Provisions****2.13.1 Telephone Number Changes**

Whenever any Customer's telephone number is changed after a directory is published, the Company shall intercept all calls to the former number for at least one hundred and twenty (120) days and give the calling party the new number provided existing central office equipment will permit, and the Customer so desires. When service in an existing location is continued for a new Customer, the existing telephone number may be retained by the new Customer only if the former Customer consents in writing, and if all charges against the account are paid or assumed by the new Customer.

**2.13.2 Maintenance and Operations Records**

Records of various tests and inspections, to include non-routine corrective maintenance actions or monthly traffic analysis summaries for network administration, necessary for the purposes of the Company or to fulfill the requirements of Commission rules shall be kept on file in the office of the Company as required under Commission rules.

**2.14 Customer Responsibility**

- A. Cancellation by Customer Customers may cancel service in writing. The company shall hold the Customer responsible for payment of all charges, including fixed fees, surcharges, etc., which accrue up to the cancellation date. In the event the Customer executes a term commitment agreement with the Company, the Customer must cancel service and terminate the agreement in accordance with the agreement terms.

**3.1 Exchange Service Areas**

Local exchange services are provided, subject to availability of facilities and equipment, in areas currently served by the following Incumbent LECs:

- 1) Qwest, Inc.

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**SECTION 4 –SERVICES AND RATES****4.1 Call Timing for Usage Sensitive Services**

Where charges for a service are specified based on the duration of use, such as the duration of a telephone call, the following rules apply:

- 4.1.1 Calls are measured in durational increments identified for each service. All calls which are fractions of a measurement increment are rounded-up to the next whole unit.
- 4.1.2 Timing on completed calls begins when the call is answered by the called party. Answering is determined by hardware answer supervision in all cases where this signaling is provided by the terminating local carrier and any intermediate carrier(s).
- 4.1.3 Timing terminates on all calls when the calling party hangs up or the Company's network receives an off-hook signal from the terminating carrier.

**4.2 Reserved for Future Use****4.3 Clearphone Bundled Service****4.3.1 General**

Greenfly Networks offers basic local exchange and long distance service only as part of a bundle or package of telecommunications services under the name Clearphone. All packages include Internet access, local service, long distance service (interstate and intrastate toll) and selected custom calling features. Internet access and voice share the available bandwidth, with voice being prioritized over data.

The aforementioned services are only available as part of the bundled service offering and are not available on an individual service basis. Clearphone services requires the use of a specialized CPE and is designed to interface with an existing PBX at the customer location. Interfacing between CPE and PBX can occur via Ethernet (for SIP enabled PBXs), PRI or analog lines.

Clearphone features unlimited local calling and long distance up to 1,500 Minutes of Usage (MOUs) per line, Caller ID, 3 DID's per Voice SIP Trunk (see paragraph B. in this section 4.3.1) and one Basic Directory Listing (see section 4.4.5). Each of these products is offered under a 12, 24 or 36 month term agreement. Customers will be billed directly by the Company.

Clearphone is made available in 4 configurations, depending on the customer's size and needs. Each configuration features:

- A. a specific type (DSL or T-1) and number of circuits
- B. a minimum number of Voice SIP Trunks. A Voice SIP Trunk is defined as a concurrent full-duplex SIP voice session utilizing any of the Codecs supported by the Company. Additional Voice SIP Trunks can be purchased, up to the maximum allowed for the specific configuration.

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- C. a minimum number of Direct Inward Dialing (DID) numbers . Additional DIDs can be purchased
- D. a minimum number and type of Directory Listing services
- E. additional non-voice services (e.g. fax-to-email)

The following table summarizes the features available in each Clearphone configuration and the maximum monthly rates applicable to each configuration.

**4.3.2 Maximum Rates**

Package Names	ClearPhone Lite	ClearPhone I	ClearPhone II	ClearPhone III
Bandwidth (Mbps) and circuit number/type	1.5 (1 x Asymmetrical DSL)	1.5 (1xT1)	3.0 (2xT1s)	4.5 (3xT1s)
Included Phone Lines	2	6	16	23
Supports up to Phone Lines	3	15	23	23
Included features	3 DIDs per line 1 Basic Directory Listing Caller ID 1 E911 1 Fax-to-email acct	3 DIDs per line 1 Basic Directory Listing Caller ID 1 E911 1 Fax-to-email acct	3 DIDs per line 1 Basic Directory Listing Caller ID 1 E911 1 Fax-to-email acct	3 DIDs per line 1 Basic Directory Listing Caller ID 1 E911 1 Fax-to-email acct
Recurring Monthly Cost	\$250/month	\$700/month	\$1,500/month	\$2,000/month
Maximum Rates				

**4.4 Additional services****4.4.1 Individual SIP trunk**

Individual Voice SIP Trunk service is optional feature which can be purchased in conjunction with Company-provided Clearphone services.

**Maximum Rates and Charges**

	Maximum Monthly Rate
Individual SIP Trunk	\$50

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**4.4.2 Direct Inward Dial (DID) Service**

DID service is an optional feature which can be purchased in conjunction with Company-provided Clearphone services. DID service transmits the dialed digits for all incoming calls allowing the Customer's PBX to route incoming calls directly to individual stations corresponding to each individual DID number.

Charges for DID capability and DID numbers in addition to the DIDs included in the Clearphone Bundle Service are shown below. So that the Company may efficiently manage its number resource, the Company, at its sole discretion, reserves the right to limit the quantity of DID numbers a Customer may obtain. Requests for 300 or more DID numbers must be provided to the Company in writing no less than five (5) months prior to activation. In addition, the Company reserves the right to review vacant DID stations or stations not in use to determine their utilization. Should the Company determine, based on its own discretion, that there is inefficient number utilization, the Company may reassign the DID numbers. The Customer has no property right to the telephone number or any other call number destination associated with DID service furnished by the Company, and no right to the continuance of service through any particular end office. The Company reserves the right to change such numbers, or the end office designation associated with such numbers, or both, assigned to the Customer, whenever the Company deems it necessary to do so in the conduct of its business.

**Maximum Rates and Charges**

	Maximum Monthly Rate
Additional DID	\$3

**4.4.3 Toll free service**

This service is inbound calling only where an 800, 866 or 888 or other toll-free prefix number rings into a Customer's premise routed to a specific telephone number or terminated over a dedicated facility. Toll Free Services are sold in configurations that feature a certain number of MOUs included in a flat monthly fee, and a per-minute charge that applies when the Customer exceeds the allotted MOUs (Overage Rate).

**Product Packages**

- A. Basic toll free: charged on a per minute basis starting with first minute of usage, plus a monthly fee.
- B. Toll-free 500. Customer pays monthly fee and can share up to 500 minutes per month across all users in organization. MOUs in excess of 500 are charged on a per minute basis
- C. Toll-free 1,000: Toll-free 1,000. Customer pays monthly fee and can share up to 1,000 minutes per month across all users in organization. MOUs in excess of 1,000 are charged on a per minute basis

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- D. Toll-free 2,500: Toll-free 2,500. Customer pays monthly fee and can share up to 2,500 minutes per month across all users in organization. MOUs in excess of 2,500 are charged on a per minute basis
- E. Toll-free 5,000: Toll-free 5,000. Customer pays monthly fee and can share up to 5,000 minutes per month across all users in organization. MOUs in excess of 5,000 are charged on a per minute basis

**Public Pay Telephone Surcharge**

In order to recover the Company's expenses to comply with the FCC's pay telephone compensation plan effective on October 7, 1997 (FCC 97-371), an undiscountable per call charge is applicable to all toll-free calls that originate from any pay telephone. Pay telephones include coin-operated and coinless phones owned by local telephone companies, independent companies and interexchange carriers. The Public Pay Telephone Surcharge applies to the initial completed call and any reoriginated call. The Public Pay Telephone Surcharge does not apply to calls placed from pay telephones at which the Customer pays for service by inserting coins during the progress of the call. Whenever possible, the Public Pay Telephone Surcharge will appear on the same invoice containing the usage charges for the surcharged call. In cases where proper pay telephone coding digits are not transmitted to the Company prior to completion of a call, the Public Pay Telephone Surcharge may be billed on a subsequent invoice after the Company has obtained information from a carrier that the originating station is an eligible pay telephone.

**Maximum Rates and Charges:**

	Maximum Monthly Rate	Maximum Overage Per Minute Rate
Basic Toll-Free	\$10	\$.25
Toll-free 500	\$75	\$.25
Toll-free 1,000	\$150	\$.25
Toll-free 2,500	\$339	\$.25
Toll-free 5,000	\$600	\$.25

	Maximum Rate Per Completed Call
Public Pay Telephone Surcharge	\$1

**4.4.4 PRI Replacement**

This product can be used by Customers to replace existing ISDN Primary Rate Interface (PRI) service with an IP/SIP based service featuring 23 Voice SIP Trunks utilizing a single T-1 connection. PRI Replacement service requires the use of a specialized CPE and is designed to interface with an existing PBX at the customer location. Interfacing between CPE and PBX can

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occur via Ethernet (for SIP enabled PBXs) or PRI.

PRI Replacement features unlimited local calling and long distance up to 1,500 MOUs per line, Caller ID, 3 DIDs per Voice SIP Trunk (see 4.3.1.B ) and one Basic Directory Listing (see section 4.4.5). Unlike Clearphone, this product does not include Internet Access. PRI Replacement is offered under a 12, 24 or 36 month term agreement.

	Maximum Monthly Rate
PRI Replacement	\$1,500

**4.4.5 Directory listing****General**

The following rates and regulations apply to standard listings in light face type in the white pages (alphabetical section) of the telephone directory and to the Directory Assistance records of the Company. Directory listings are limited to such information as is essential to the identification of the listed party. The listing of a service, commodity, or trade name is not permitted unless it is the name, or an integral part of the name, under which the Customer does business. A listing is limited to one line in the directory, except where in the judgment of the Company, more than one line is required to identify the Customer properly. In such cases, the additional lines required are provided at no extra charge. Listing services are available with all classes of main telephone exchange service.

**Listings**

- A. Primary Listing. One listing, termed the primary listing, is included with each Clearphone or PRI Replacement service, or each joint user service.
- B. Additional Listings. Additional listings may be the listings of individual names of those entitled to use the customer's service or, for business, Departments, Divisions, Tradenames, etc. In connection with business service, regular additional listings are available only in the names of Authorized Users of the Customer's service. Ordinarily, all additional listings are of the same address and telephone number as the primary listings, except as provided for joint user and alternate number listings. However, when it appears necessary as an aid to the use of the directory and provided satisfactory service can be furnished, a listing will be permitted under the address of a branch exchange, Centrex or extension of an exchange service line installed on the premises of the Customer, but at an address different from that of the attendant position of main service. Special types of additional listings, such as Alternate, Alpha and Informational, Duplicate and Reference Listings, Foreign Listings, etc. take the same business classification as the service with which such listings are furnished.
- C. Non-published Service. The telephone numbers of non-published service are not listed in either the Company's alphabetical directory or Directory Assistance

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records available to the general public. Non published information may be released to emergency service providers, to customers who subscribe to Company offerings which require the information to provide service and or bill their clients, or, to telephone customers who are billed for calls placed to or from non-published numbers and to entities which collect for the billed services. Non-published names and or telephone numbers may also be delivered to customers on a call-by-call basis. Incoming calls to non-published service will be completed by the Company only when the calling party places the call by number. The Company will adhere to this practice notwithstanding any claim the calling party may present, except claims of emergencies involving life and death. In such cases, the Company will call the non-published number and request permission to make an immediate connection to the calling party. When the Company agrees to keep a number unlisted, it does so without any obligation. Except for cases of gross negligence or willful misconduct, the Company is not liable for any damages that might arise from publishing a non-published number in the directory or disclosing it to some. If, in error, the telephone number is published in the directory, the Company's only obligation is to credit or refund any monthly charges the Customer paid for non-published service. The Subscriber indemnifies (i.e., promises to reimburse the Company for any amount the Company must pay as a result of) and save the Company harmless against any and all claims for damages caused or claimed to have been caused, directly or indirectly, by the publication of a non-published service or the disclosing of said number to any person.

- D. Non-listed Service. Non-listed service means that the Customer's telephone number is not listed in the directory, but does it appear in the Company's Directory Assistance Records. This service is subject to the rules and regulations for E911 service, where applicable. The Company will only complete calls to a non-listed number, if requested by a caller, during the course of a directory assistance call completion service. When the Company agrees to keep a number unlisted, it does so without any obligation. Except for cases of gross negligence or willful misconduct, the Company is not liable for any damages that might arise from publishing a non-listed number in the directory or disclosing it to some. If, in error, the telephone number is listed in the directory, the Company's only obligation is to credit or refund any monthly charges the Customer paid for non-listed service. The subscriber indemnifies (i.e., promises to reimburse the Company for any amount the Company must pay as a result of) and save the Company harmless against any and all claims for damages caused or claimed to have been caused, directly or indirectly, by the publication of a non-listed service or the disclosing of said number to any person.
- E. Toll-Free Directory Listings. Where available, a listing which references the Toll Free Number for a Business customer will be made available.
- F. Straight Line Under Directory Listing. A business listing where one or more listings are indented under an original listing of the same customer without

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repetition of the name. G. Caption and Sub-caption Directory Listings Two or more business listings may be placed under a caption consisting of the name of the customer or of any of the parties which the customer is entitled to list together with a designation or title where the name is not indicative of the business or profession. One or more sub captions may be furnished under a caption, each sub caption consisting of a directive heading which serves to identify two or more listings placed there under, where this grouping is necessary for the proper routing of calls.

## Maximum Rates and Charges

	Maximum Monthly fee
Primary Listings	\$0
Additional Listings	\$10
Nonlisted Service	\$10
Nonpublished Service	\$10
Toll-Free Directory Listings	\$30
Straight Line Under Listings	\$10
Captions and Subcaptions Listings	\$10

## 4.4.6 Analog Telephone Line

Company markets a standard Analog Telephone Line for to be used for applications that are not compatible with IP-based transport (e.g. some fax machines, credit card terminals, or security systems that use modulated analog signals that are incompatible with common VoIP Codecs)

## Maximum Rates and Charges

	Maximum Monthly Rate
Analog telephone Line	\$60

## 4.4.7 Directory Assistance Services

A Customer may obtain assistance, for a charge, in determining a telephone number by dialing Directory Assistance Service. Calls are completed automatically after the desired number has been located. There are no call allowances for Directory Assistance. Charges will not apply for calls placed from hospital services or calls placed from telephones where the Customer has been affirmed in writing as unable to use a Company provided directory because of a visual, physical or reading handicap. A Customer can also receive assistance by writing the Company with a list of names and addresses for which telephone numbers are desired.

## Maximum Rates

	Maximum Per-Completed Call Rate

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Directory Assistance	\$2.0
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**SECTION 5.0 - MISCELLANEOUS SERVICES AND RATES****5.1 Service Order and Change Charges**

Non-recurring charges apply to processing Service Orders for new service and for changes in service.

**Service Order Charges**

	Maximum Rates
Clearphone Activation Charge (Clearphone Lite, I, II)	\$500
Clearphone Activation Charge (Clearphone III)	\$1,000
SIP Trunk Activation Charge	\$60
DID Activation Charge/Port Charge	\$20
Toll-Free Activation Charge	\$40
PRI Replacement Activation Charge	\$1,000
Analog Telephone Line Activation Charge	\$80
Directory Listing Activation Charge	\$20
Transfer of Service Charge	\$150
Technician Dispatch Charge (or Trouble Isolation Charge)	\$150
Premises Visit Charge, first 15 minutes	\$80
Premises Visit Charge, add'l 15 minutes	\$60

**Change Order Charges:**

Telephone Number Change Order	Maximum Rates
Feature Change Order	\$50
Record Change Order	\$50
Listing Change Charge	\$50

**Miscellaneous Charges**

	Maximum Monthly Fee
Paper Invoicing	\$25
Call Detail Report in format other than PDF	\$25

**5.2 Service Order Charges – Definitions**

Activation Charge: applies to requests for initial connection or establishment of telephone service to the Company.

Transfer of Service Charge: applies to the first line of a Transfer of Service Order, (TOS) when a customer requests a move or change in physical location. This charge applies whether a customer changes telephone number or not. If, in addition, the Customer requests the telephone number be

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changed, a separate charge may apply.

**Technician Dispatch (or Trouble Isolation) Charge:** A separate Technician Dispatch Charge (or Trouble Isolation Charge) applies, in addition to all other charges for the visit, when a visit to the Customer's premises is necessary to isolate a problem reported to the Company but identified by the Company's technician as attributable to Customer-provided equipment or inside wire. This charge also applies for visits by the Company's agents or employees, at the Customer's request, to the Premises of the Customer, when the Customer fails to meet the Company's agent or employees for the prearranged appointment as requested.

#### **5.1.6 Change Order Charges –Definitions**

**Change Order Charge:** applies to work associated with providing exchange line service or customer-requested changes to existing services. One charge applies for each change order requested by the customer. If multiple changes listed below are requested by the Customer and occur on the same order / request one charge only applies.

**Listing Change Charge:** applies when a Customer requests for orders a change to add or delete a white pages listing or requests a change to add/delete listings. This charge also applies to request for Non-Published or Non-Listed numbers.

**Record Change charge:** applies when a Customer requests/orders a change to Company records such as adding / changing a name on said Customer's account, changing billing address or contact information, adding/changing the person(s) authorized to make changes on said Customer's account.

#### **Miscellaneous Charges - Definitions**

**Paper Invoicing:** applies when a Customer requests the monthly service invoice to be mailed in hard copy form, as opposed to sent electronically in PDF format.

**Call Detail Report in format other than PDF:** applies when a Customer requests the monthly CDR report to be mailed electronically in a format other than PDF (e.g. Microsoft Excel or Ascii-delimited)

#### **5.3 Reserved For Future Use**

#### **5.4 Restoration of Service**

A restoration charge applies to the restoration of suspended service and facilities because of nonpayment of bills and is payable at the time that the restoration of the suspended service and facilities is arranged. The restoration charge does not apply when, after disconnection of service, service is later re-installed.

	Maximum Rates: Per occasion, per service item:
Restoration of service	\$20.0

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**SECTION 7 - SPECIAL ARRANGEMENTS****7.1 Individual Case Basis (ICB) Arrangements**

Arrangements will be developed on a case-by-case basis in response to a bona fide special request from a Customer or prospective Customer to develop a competitive bid for a service not generally offered under this tariff. Rates quoted in response to such competitive requests may be different than those specified for such services in this tariff. ICB rates will be offered to the Customer in writing and on a nondiscriminatory basis.

ICB will be filed with the Communications Division of the Commission.

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**SECTION 8 - PROMOTIONS**

**8.1 Special Promotions**

The Company may, from time to time, offer services in this Tariff at special promotional rates and or terms. Such promotional arrangements shall be filed with the Commission when so required. All rates and terms contained in this Tariff shall continue to apply unless specifically addressed in the promotional agreements.

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**SECTION 9 – CURRENT PRICE LIST**

<b>Product Name</b>	<b>Product Code</b>	<b>List Price</b>
Clearphone I	CP110	\$495.00
Clearphone II	CP210	\$995.00
Clearphone III	CP310	\$1,695.00
Clearphone Lite	CPS10	\$195.00
Directory Listing	VDL10	\$0.00
PRI Replacement	VPR10	\$1,095.00
Analog Line	VAL10	\$39.95
Additional SIP Trunk	VTR10	\$49.95
DID	VTN10	\$3.00
Toll Free 1000	VTF1K	\$44.95
Toll Free 2500	VTF2K5	\$112.95
Toll Free 500	VTFK5	\$24.95
Toll Free 5000	VTF5K	\$199.95
Toll Free Basic	VTF10	\$5.00

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## Attachment E - Arizona Projections

[illegible]

**Attachment F: Order Dismissing Applicant Officer**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
SPRINGFIELD DIVISION**

THOMAS E. BARON, LINDA S. )  
BARON, CHRISTOPHER T. )  
MALLAVARAPU, JANET K. )  
MALLAVARAPU, ROBERT V. )  
TRASK, MARY L. TRASK, )  
ROTFL, LLC, a Nevada limited )  
liability company, and ALPHA )  
FOXTROT, LLC, a Nevada limited )  
liability company, )

Plaintiffs, )

v. )

No. 05-3240

WILLIS CHRANS, STEVEN K. )  
BENTLEY, REAL ESTATE SYSTEMS )  
OF GILLETTE, INC. d/b/a Better )  
Business Systems, BANK OF )  
SPRINGFIELD, an Illinois banking )  
corporation, )  
MICHAEL McGLASSON, and )  
JAMES KELLEY, )

Defendants. )

**OPINION**

JEANNE E. SCOTT, U.S. District Judge:

This matter comes before the Court on the Defendants' Motions for Summary Judgment (d/e 141, 142, 143, 144, and 145). For the reasons set

forth below, the Motions for Summary Judgment filed by Defendants Steven K. Bentley, and Real Estate Systems of Gillette, Inc. (RES), are ALLOWED, and the Motion for Summary judgment filed by Defendant Willis Chrans is ALLOWED in part and DENIED in part. The Motions for Summary Judgment filed by Defendants Bank of Springfield, McGlasson and Kelley are denied as moot because these parties have entered into a binding settlement agreement.

### STATEMENT OF FACTS

In 1997, Randall Martin and Donald Mallette owned a company called Capital Aircraft, Inc. (Capital).<sup>1</sup> Capital was located in Springfield, Illinois, and it leased commercial aircraft and aircraft engines to foreign airlines. In 1997, Capital hired Defendant RES to perform professional management services for Capital. Defendants Willis Chrans and Steven Bentley were the principles of RES. Under the Management Agreement, Chrans became Capital's chief operating officer and Bentley became the chief financial officer. Bank of Springfield's Motion for Summary Judgment (d/e 141) (Bank Motion), Statement of Undisputed Fact (Bank SUF) ¶¶ 28-

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<sup>1</sup>Martin, Mallette, and Fayeze Chehab were originally named as Defendants in this case. The claims against them have been dismissed. Opinion entered May 11, 2006 (d/e 94); Text Order entered January 3, 2008.

31.<sup>2</sup>

In 1997, Capital formed an affiliated limited liability company called Capital Airline Leasing Company Three, LLC (Cap III). Cap III acquired a Fokker-28-1000 airplane (F-28). Capital Aircraft Holding Company LLC (Capital Holding) owned 87.5 percent of Cap III and an investor named Jeremy Michaels owned the remaining 12.5 percent. Capital Holding was owned by Mallette and Martin. Bank SUF ¶¶ 32-34.

Cap III tried to lease the F-28 unsuccessfully to an Argentinian airline called Aerogauchito. The president of Aerogauchito told Mallette that another Argentinian airline called American Falcon, S.A. (American Falcon), was interested in leasing the F-28. At this point in time, American Falcon only flew charter flights using aircraft leased on an hourly basis from a civilian arm of the Argentinian military. American Falcon's principal, Fayed Chehab, was interested in acquiring planes and starting regular commercial service in Argentina. Bank SUF ¶¶ 35-37.

In July 1998, Defendant Bank loaned \$2,500,000.00 to Cap III to

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<sup>2</sup>The Court refers to Statements of Undisputed Facts in the various Memoranda that were not disputed by the opposing party. See Local Rule 7.1(D). Some of the undisputed facts come from Memoranda of those who have settled, but the facts are used to provide context for the involved fact pattern here.

refinance the F-28. The loan was guaranteed by Mallette, Martin, Jeremy Michaels, William Pyle (a Springfield physician), and Capital. Each guarantee was limited to \$650,000.00. In November 1998, Cap III leased the F-28 to American Falcon. In July 1999, the Bank refinanced the loan on the F-28 with the same guarantors. Bank SUF ¶¶ 40-43.

In August 1999, Chehab came to Springfield to look at two McDonnell-Douglas DC-9 planes owned by Capital (DC-9s). He wanted to lease those planes to put them into service with American Falcon. Bank SUF ¶ 45.

Chehab also offered Capital's principles the opportunity to buy American Falcon stock. In November 1999, Martin, Mallette, Chrans, Bentley, and three other individuals associated with Capital, Steve Young, Jeff Shaw, and Jeremy Michaels (Capital Group) formed the Capital Airline Investment LLC. Capital Airline Investment LLC purchased 460,000 shares of American Falcon from Chehab for a stated purchase price of \$1,500,000.00. The Capital Group, collectively, paid \$500,000.00 at the time of the purchase. The Capital Group agreed to pay the rest of the purchase price over time, however, the Capital Group never paid any more for the stock. Defendants did not disclose the terms of this stock



acquisition to the Plaintiffs. Bank SUF ¶¶ 47-49; Plaintiffs' Response to Chrans Motion for Summary Judgment (d/e 149), Statement of Additional Undisputed Facts (Plaintiffs' Response to Chrans SUF) ¶ 43.

In addition, Capital Airline Investment LLC also agreed to broker a sale of 280,000 of Chehab's shares of American Falcon to an investor group by July 15, 2000, for \$3,000,080.00. Chehab would contribute \$2,200,000.00 of the purchase price to American Falcon and loan \$440,000.00 of the purchase price to the buying investment group. Bank SUF ¶ 47.

On February 7, 2000, Chehab sent Chrans, Bentley, and RES an email in which he recommended that American Falcon stop operating on February 15, 2000, and to forget about regular flights altogether. Chehab complained about the high cost of operating the F-28. In March 2000, Chehab met with Chrans in Miami to discuss the financial condition of the company. Chehab presented three options: raise sufficient funds to finance the projected deficit; try to sell American Falcon; or close the company as soon as possible to avoid further losses. In March 2000, Chehab told Chrans that he would put the company into bankruptcy on May 1, 2000, if they could not provide any assistance. Plaintiffs' Response to Chrans SUF ¶¶ 22-24.

In April 2000, Mallette and Bentley asked the Bank for \$200,000.00 in additional credit to perform the maintenance on the F-28 and to rebuild its engines. Bank SUF ¶ 50; Plaintiffs' Response to Chrans SUF ¶ 25.

In Spring 2000, Chrans, Bentley, and RES prepared and distributed a document called a Private Placement Offering (PPO) to prospective investors to offer an opportunity to invest in American Falcon. Chrans Motion for Summary Judgment (d/e 143) (Chrans Motion), Exhibit 12, PPO. Chrans and Bentley also distributed a copy of a Power Point presentation of the investment opportunity. Id., Exhibit 13, Power Point Presentation (Power Point) (the Power Point and PPO are collectively referred to as the Offering Documents).

The Offering Documents explained that American Falcon was a start-up airline in Argentina. American Falcon leased one airplane, the F-28, and also rented other planes on an hourly basis. American Falcon planned to lease additional planes, expand its charter business, and start regularly scheduled air service in South America. The Offering Documents explained that the F-28 was not currently flying because of a required maintenance check. The proposal contained projections that estimated that American Falcon would start producing positive net income in August 2000, and

would have a net income in 2001 of over \$5,000,000.00. By 2004, the PPO projected that American Falcon would have an annual net income of more than \$11,800,000.00.

The Offering Documents sought ten investors. Under the proposal, a new limited liability company called American Falcon Investment Company, LLC (AMFAL Investment) would be formed. The Bank would lend AMFAL Investment \$3,000,000.00. AMFAL Investment would use \$2,200,000.00 to buy 33.3 percent of American Falcon stock. AMFAL Investment would use \$521,818.00 for debt service until American Falcon started to generate enough positive cash flow to service the debt. The remaining \$278,182.00 would be held in reserve. The PPO projected that American Falcon would start servicing the debt in March 2001. The ten prospective investors would sign personal guarantees of \$300,000.00 each to guarantee the Bank's loan to AMFAL Investment, but put up no cash. In exchange, each investor would receive a ten percent interest in AMFAL Investment (and, through AMFAL Investment, a 3.33 percent ownership interest in American Falcon). Bank SUF ¶ 59. The Offering Documents disclosed that Chehab would own 33.3 percent of American Falcon, and the Capital Group would own the remaining 33.3 percent.

The PPO also contained an Addendum that stated that the investors in AMFAL Investment would be given the opportunity to invest in the airplanes that American Falcon planned on acquiring. The proposal explained that the investors would form new limited liability companies to own the planes, and then lease the planes to American Falcon. It was anticipated that four planes would be acquired and leased to American Falcon. Bank SUF ¶ 60; Second Amended Complaint (d/e 101), Exhibit 3, Addendum to Investment Opportunity In American Falcon Involving Airplane Ownership.<sup>3</sup>

The PPO also contained disclaimers about the risks of the proposal, and also the underlying assumptions. Among other things, the PPO assumed that the F-28 would be back in service by April 16, 2000, that American Falcon would have a Boeing 737 airplane in service by August 1, 2000, and a second Boeing 737 in service by January 1, 2001. PPO, Schedule of Assumptions to the Projections-2000 to 2001.

The Offering Documents did not disclose certain matters. The Offering Documents did not disclose Chehab's statements earlier in 2000

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<sup>3</sup>The Exhibits were filed with the original Complaint (d/e 1-6), and are incorporated by reference into the Second Amended Complaint.

that the venture was too costly to operate and should be shut down, nor his threat to put the company in bankruptcy. The Offering Documents did not disclose that the Capital Group paid only \$500,000.00 for its stock.

Plaintiffs Robert Trask (Dr. Trask), Thomas Baron (Dr. Baron), and Christopher Mallavarapu (Dr. Mallavarapu) were all physicians living in Springfield, Illinois. Dr. Trask was married to Plaintiff Mary Trask; Dr. Baron was married to Plaintiff Linda Baron; and Dr. Mallavarapu was married to Plaintiff Janet Mallavarapu. Randall Martin was also a physician. The Plaintiffs received the Offering Documents. Bank SUF ¶¶ 2-19, 52-58.

On June 5, 2000, AMFAL Investment was formed. A total of fourteen units were subscribed by investors. The Trasks, Barons, and Mallavarapus, as married couples, each invested in one unit of AMFAL Investment, for a total of three units. The Plaintiffs signed the Operating Agreement for AMFAL Investment on June 9, 2000. The Operating Agreement recited that fourteen units were sold, rather than the ten proposed in the Offering Documents. The Operating Agreement identified all of the investors. The transaction was adjusted to reflect the fact that the offering was oversubscribed. AMFAL Investment borrowed \$4,200,000.00 from the

Bank and purchased 47 percent of the stock in American Falcon. As a result AMFAL Investment still owned 3.33 percent of American Falcon stock for each investment unit in AMFAL Investment. Each Plaintiff also signed a personal guarantee with the Bank guaranteeing the loan to AMFAL Investment. Bank SUF ¶¶ 62-67.<sup>4</sup>

The guarantees were absolute, unconditional guarantees of payment which waived any and all defenses, including any failure of the Bank to perfect security interests in collateral. The obligations of the guarantors were joint and several and were continuing until the obligation, including interest, fees, attorney fees and costs of collection, were paid in full. Bank Motion, Exhibits 26-28, AMFAL Investment Guarantees.

AMFAL Investment paid \$2,200,000.00 to American Falcon as a contribution of new capital for new stock. AMFAL Investment paid \$900,000.00 to existing shareholders to buy additional stock: \$460,000.00 went to Chehab; and \$440,000.00 was divided among Bentley, Shaw, Young, and Michaels. Bentley received \$110,000.00 for one third of his stock. He had paid \$90,000.00 for all of his stock less than a year earlier.

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<sup>4</sup>The Plaintiffs disputed the Bank's SUF ¶ 65 only to the extent that the paragraph did not state that the guarantees were joint and several. The obligations of the guarantors were joint and several.

Plaintiffs' Summary Judgment Exhibits (d/e 150) (Plaintiffs' Exhibits), Exhibit K, Deposition of Steven Bentley on February 7, 2007, at 100-03, 134-35. The Offering Documents did not disclose that AMFAL Investment was paying more than three times the price paid by the Capital Group for American Falcon stock.

While AMFAL Investment was forming, Capital was looking for airplanes to lease to American Falcon. By May 10, 2000, Capital located a Boeing 737 (Capital 737) to acquire and lease to American Falcon. The Capital 737 was already in Argentina. The Capital 737 needed extensive maintenance work. Capital planned to purchase the Capital 737 for \$2,500,000.00 and lease it to American Falcon for \$85,000.00 per month. Capital planned to finance the purchase with a loan from Marine Bank of Springfield, Illinois (Marine Bank). In September 2000, Marine Bank loaned Capital \$3,100,000.00 to purchase the Capital 737. The loan was a short-term loan until the required maintenance was completed. Capital expected to arrange long-term financing and sell the Capital 737 to a limited liability company that would, in turn, lease the Capital 737 to American Falcon. Bank SUF ¶¶ 69-73.

In September 2000, Bentley presented a status report to AMFAL

Investment members. The status report stated that the purchase of the Capital 737 had been completed, but the plane was not ready to fly because it had to undergo a maintenance check. The report indicated the Capital 737 would start flying in January 2001. The report also stated that the F-28 experienced mechanical problems and reduced its flying time. The status report stated that an additional \$2,367,039.00 was needed to keep the company going until the planes started flying. The status report proposed that AMFAL Investment members loan \$85,750.00 per membership unit to AMFAL Investment. The report stated that the loans would be repaid from operational income in 2001. Chrans and Chehab also told the AMFAL Investment members, including the Plaintiffs, that they needed the additional funds in connection with negotiations between Air France and American Falcon, to meet certain requirements set by Air France for a business relationship. In November 2000, the Plaintiffs, as couples, made three loans to AMFAL Investment of \$85,750.00 each. The loans were evidenced by promissory notes repayable in one year at 10 percent interest. The loans were never paid back. Bank SUF ¶¶ 74-76; Second Amended Complaint, ¶ 63; Answer and Affirmative Defenses of Chrans, Bentley and RES (d/e 107 & 108), ¶ 63.



On November 9, 2000, Capital entered into a Lease with American Falcon to lease the Capital 737. Capital did not intend to charge rent until the Capital 737 was ready for service and properly registered in Argentina. Bank SUF ¶ 73. American Falcon also discussed leasing the DC-9s. The parties discussed leasing the DC-9s throughout 2001, but never completed those Leases. Bank SUF ¶¶ 74, 77, 83, 95-102.

AMFAL Investment held another meeting on February 22, 2001. At that point, the investors were told that the Capital 737 was still not flying and that Capital was having difficulty getting long-term financing for the Capital 737. The Argentinian government would not authorize the Capital 737 to fly commercially in Argentina. Bentley and Mallette presented a proposal to lease the DC-9s to American Falcon. Bentley also presented financial statements for the fiscal year ending September 30, 2000, and for the year-to-date through January 31, 2001. The statements showed a net loss of (\$2,099,360.49) for the fiscal year ending September 30, 2000, and an additional net loss of (\$1,193,960.95) for the four months from October 2000 through January 2001. Bentley told the investors then the company would need another \$1,477,513.00 to cover losses through May 31, 2001. He also told them that American Falcon would need an additional

\$250,000.00 for each month that it was delayed in putting the planes into operation. He revised the projected 2001 first-quarter income from \$410,377.00 in positive net income, to a loss of (\$1,104,294.00). Bank SUF ¶¶ 77-80.

At the February 22, 2001, meeting, Chrans represented to Plaintiffs that American Falcon had secured \$9,000,000.00 to \$13,000,000.00 in charter revenue under contract. Plaintiffs' Exhibits, Exhibit Q, Deposition of Thomas Baron on February 14, 2007 (2-14-07 T. Baron Deposition), at 253-55; Bank Motion, Exhibit 50, Minutes of American Falcon Shareholders' Meeting on February 22, 2001 (February 22, 2001, Minutes). The members of AMFAL Investment also voted to have the members become the direct owners of the American Falcon stock that AMFAL Investment purchased in the original June 2000 transaction. Chrans Motion, SUF ¶ 46; February 22, 2001, Minutes.

AMFAL Investors next met on April 26 and 27, 2001. Capital and American Falcon had continued discussions regarding the Lease of the DC-9s. A proposal was approved for American Falcon to issue 640,000 additional shares at a price of \$5.00 per share. Chehab would also receive 130,000 shares to minimize dilution of his ownership interest. The

remaining new shares would be sold to existing shareholders for a total additional investment of \$2,500,000.00. The agenda also contained a statement that American Falcon needed an additional \$250,000.00 "by Monday." Chehab stated that American Falcon needed \$250,000.00 per month for every month until American Falcon had the DC-9s and the Capital 737 under lease and in operation. Projections were presented that said that the Capital 737 could start flying in July and the DC-9s could start flying in September 2001. Bank SUF ¶¶ 88-89, Bank Motion, Exhibit 62, Minutes of American Falcon Shareholders Meeting on April 26-27, 2001.

The members of AMFAL Investment met immediately after the April 27, 2001, American Falcon shareholders' meeting. The members elected Plaintiff Janet Mallavarapu as Manager of AMFAL Investment. Chrans had previously acted as Manager. Janet Mallavarapu thereafter received monthly financial reports from Chehab. Bank SUF ¶¶ 90-92.

On May 14, 2001, Bentley emailed the members of AMFAL Investment, including Plaintiffs Drs. Baron, Trask, and Mallavarapu, with information that American Falcon's financial statement showed that American Falcon had a net loss of (\$2,005,551.00) for the period from October 1, 2000, to April 30, 2001. Bank SUF ¶ 106. On the same day,

Chehab sent an email to AMFAL Investment members reiterating that American Falcon needed \$250,000.00 per month to stay afloat until the F-28 was returned to service and a 737 was secured and put into service. He presented several options ranging from acquiring planes from other lessors, to purchasing planes, to closing the company. Bank SUF ¶ 107. Chrans, Chehab, and Bentley, however, also stated to Plaintiffs that they should ignore the financial statement showing American Falcon had lost more than \$2,000,000.00 because the losses were incurred because Capital would not supply American Falcon with the Capital 737. Plaintiffs' Exhibits, Exhibit I, Deposition of Christopher Mallavarapu on January 29, 2007 (1-29-07 C. Mallavarapu Deposition), at 155-56.

The American Falcon shareholders then met on May 22, 2001. The chair asked for a motion to close the company, but no motion was forthcoming. The shareholders discussed the pledges made to purchase the additional shares for the \$2,500,000.00 approved at the April meeting. After the meeting, a letter was sent to each AMFAL Investment member and purportedly signed by Janet Mallavarapu. The letter stated that each member was required to contribute an additional \$6,380.00 per month to AMFAL Investment to service the Bank loan until the Capital 737 and

Capital DC-9s were in service for American Falcon. Bank SUF ¶¶ 113, 116-17.

In April or May or June 2001, Dr. Mallavarapu met with Michael McGlasson, an officer of Bank of Springfield, to discuss the AMFAL Investment Guarantees. During that meeting, McGlasson told Dr. Mallavarapu about the various loans between the Bank and Capital and about the strength of some of the other guarantors. With respect to several of the guarantors, McGlasson said that he had no comment on the guarantor's financial condition. After the meeting, the Plaintiffs became concerned that they were exposed to joint and several liability with co-guarantors who were weak credit risks. McGlasson told Mallavarapu at the meeting not to worry about Capital because, despite its high debt structure, it always paid its bills. Plaintiffs' Response to Bank's Motion for Summary Judgment (d/e 148) ( Plaintiffs' Response to Bank), at 17-18 Statement of Additional Undisputed Fact (Plaintiffs' Response to Bank SUF) ¶¶ 10-11.

Throughout the spring and summer of 2001, a group of AMFAL Investment members, along with Chrans and Chehab (collectively the 737 Group), discussed the possibility of buying another Boeing 737 airplane to lease to American Falcon. The Plaintiffs were part of the 737 Group. In

May 2001, Dr. Mallavarapu contacted McGlasson at the Bank to seek financing for the purchase of an airplane to lease to American Falcon. The borrower would be the 737 Group. On June 8, 2001, McGlasson wrote Dr. Mallavarapu to confirm that the Bank would provide financing, but the specifics of the loan would depend on the amount of the loan and the specific airplane involved. Bank SUF ¶¶ 119.

Chrans told the Plaintiffs on July 2, 2001, that American Falcon had lucrative routes and just needed more planes to secure additional lucrative routes. Plaintiffs' Response to Chrans SUF ¶ 58.

On July 9, 2001, Dr. Mallavarapu took Chehab to meet McGlasson to discuss financing the purchase of a Boeing 737 airplane. McGlasson had not previously met or spoken to Chehab. Following the meeting, the Bank committed to lend the group \$4,200,000.00 to buy the plane, to be secured by a lien on the plane and personal guarantees of the investors. Bank SUF ¶¶ 126-127.

Later that day, on July 9, 2001, American Falcon shareholders held their next meeting. The Capital 737 was still not flying, and Capital and American Falcon had not agreed on a lease of the DC-9s. Chehab asked shareholders to deposit the remainder of their prior financial commitments

to American Falcon by July 12, 2001. At the close of the meeting, the members of AMFAL Investment discussed refinancing the June 2000 \$4,200,000.00 AMFAL Investment loan. Bank SUF ¶¶ 125, 129. On July 22, 2001, a reminder letter was sent to each AMFAL Investment member, purportedly signed by Janet Mallavarapu, stating that the \$6,380.00 monthly payment was due to AMFAL Investment for the August bank loan payment. Bank SUF ¶ 133.

In August 2001, AMFAL Investment and its members refinanced the June 2000 \$4,200,000.00 note. Some members exchanged their \$300,000.00 guarantees for promissory notes with a principal balance of \$248,509.68. AMFAL Investment signed a note for \$728,823.64 to refinance the debt from some of the members who did not exchange their guarantees for personal loans. The Plaintiffs all exchanged their guarantees for personal loans and were no longer obligated to the Bank on the original June 2000 guarantees. The Bank did not call the guarantees. Bank SUF ¶¶ 134-138.

On August 25, 2001, the Bank loaned \$3,000,000.00 to American Falcon. The \$3,000,000.00 was then deposited into a Certificate of Deposit at the Bank to secure the loan. McGlasson understood that this transaction

was intended to allow American Falcon to list the borrowed funds as cash reserves on its balance sheet to satisfy Argentinian airline regulators. The Bank did not disclose this \$3,000,000.00 loan to the Plaintiffs. Plaintiffs' Response to Bank SUF ¶¶ 14-16. Chrans approved this transaction as a director of American Falcon. Plaintiffs' Response to Chrans SUF ¶ 59.

In August 18, 2001, the 737 Group met with an investment advisor called the Opes Group to discuss structuring the investment in this new 737 airplane. The Opes Group provided a proposal that involved setting up a foreign business corporation and transferring income paid to that corporation in an effort to defer income tax. The Opes Group presentation also contained a discussion of the risks involved and noted that the investors could be personally liable for the full amount of the bank loans should the venture fail. Bank SUF ¶¶ 139-43.

On September 9 and 10, 2001, Chrans notified the 737 Group that he had located an airplane available for purchase. The purchase plan called for borrowing \$4,000,000.00 from the Bank guaranteed by the investors. On September 12, 2001, Chrans told the 737 Group members that they would realize monthly gross revenues ranging from \$85,000.00 to \$95,000.00 with a positive net cash flow of \$26,000.00 to \$34,500.00 per



month on their investment. Plaintiffs' Response to Chrans SUF ¶ 60.<sup>5</sup> Chrans sent an email to Plaintiffs on September 19, 2001, regarding a possible purchase of a 737. He stated that the purchase price would be \$3,800,000.00, with a \$200,000.00 rebate paid back by the seller. On October 12, 2001, the 737 Group organized ROTFL, LLC (ROTFL) to purchase the plane.<sup>6</sup> The Plaintiffs were members of ROTFL. Bank SUF ¶¶ 144-45, 151, 165.

Around this time, Chrans told the Plaintiffs that American Falcon just needed time and equipment to be successful. Chrans told the Plaintiffs that the addition of another Boeing 737 would allow American Falcon to take full advantage of the business opportunities continuing to flow to the company. Plaintiffs' Response to Chrans SUF ¶¶ 61-62. Chrans also told the Plaintiffs in the fall of 2001 not to be alarmed by Chehab's email warnings about American Falcon's dire financial condition. Chrans told them that Chehab was trying to raise additional capital. Plaintiffs' Response to Chrans SUF ¶ 63. From October 2001 through September 13,

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<sup>5</sup>The Plaintiffs refer to the investor group as the ROTFL members, but ROTFL LLC had not yet been organized in September 2001.

<sup>6</sup>No party cites any evidence that explains the meaning of "ROTFL".

2004, Chrans did not provide the Plaintiffs with any financial statements for American Falcon. During this time, Chrans represented to Plaintiffs time and again that American Falcon was on the verge of profitability. Plaintiffs' Response to Chrans SUF ¶ 64.

On November 1, 2001, the Bank loaned ROTFL and Western Equipment Leasing Company, LLC, \$4,050,000.00 (ROTFL Loan) to buy a second Boeing 737 (ROTFL 737).<sup>7</sup> Chrans was affiliated with Western Equipment Leasing. Each Plaintiff personally guaranteed the ROTFL Loan up to \$1,050,000.00, which guarantees were subsequently reduced to \$840,000.00 each, when Chehab gave the Bank a mortgage on some real estate in France. Bank SUF ¶¶ 166-174. The guarantees were absolute, unconditional guarantees of payment unaffected by any modification, renewal or extension of the loan agreement, or any failure to perfect any lien or security interest in collateral, or to release any collateral. The Plaintiffs waived any obligation of the Bank to provide information or notices to the Plaintiffs or to seek repayment from any other source before demanding

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<sup>7</sup>Plaintiffs assert that Chrans omitted and concealed the fact that the actual market value of ROTFL 737 was considerably less than \$4,000,000.00. Plaintiffs' Response to Chrans, at 21, ¶ 69. This assertion, however, is based only on hearsay. Plaintiffs' Exhibits, Exhibit V, Deposition of Robert Trask on March 5, 2007 (3-5-2007 R. Trask Deposition), at 69-71. Hearsay is not competent evidence to oppose summary judgment. Fed. R. Civ. P. 56(e).

payment from them as guarantors. The guarantees recited that the Plaintiffs performed their own investigation and relied on their own information in making these guarantees and assumed all risks associated with the guarantees and relieved the Bank of any obligations to inform them of the borrower's financial condition. The guarantees further allowed the Bank to apply any payment from any source in any manner the Bank wished. The guarantors also agreed to be responsible for all interest, attorney fees and cost of collection. Bank Motion, Exhibits 200-02, ROTFL Guarantees. The Bank was also given a mortgage lien on the ROTFL 737. About the time of the ROTFL loan closing, McGlasson told Baron that if the Bank wanted to foreclose on the aircraft it could be flown out of the country to a different site for repossession. Plaintiffs' Response to Bank SUF ¶ 28. The Bank registered its mortgage in Argentina on the ROTFL 737. Bank SUF ¶ 182.

The seller of the ROTFL 737 paid ROTFL a \$400,000.00 rebate on the sale. Chrans told the Plaintiffs that the rebate would be used to purchase additional shares of American Falcon for ROTFL members. In fact, the money was contributed to American Falcon without any additional shares or other consideration given in return. Plaintiffs' Response to Chrans

SUF ¶¶ 70, 71.

Capital and American Falcon continued to have difficulties reaching an agreement on the lease of airplanes. The Lease on the Capital 737 would end by the end of 2001. Capital wanted a five-year renewal of the Lease, but American Falcon wanted a one-year term. Bank SUF ¶ 153. In December 2001, the Lease on the F-28 expired, and the plane was placed in storage in Buenos Aires. At or about the same time, American Falcon was finally able to start flying the Capital 737. Bank SUF ¶ 214; Chrans SUF ¶ 99.

By the beginning of 2002, Capital, however, was still unable to secure permanent financing on the Capital 737. In February and March 2002, Marine Bank called Capital's loan on the Capital 737 and the guarantees of that debt. Marine Bank offered Capital the options of: (1) making monthly payments on the debt, or (2) taking the Capital 737 back from American Falcon and leasing it to another airline. Capital opted for the latter option. The repossession was delayed throughout 2002. At one point, one of the guarantors of the Marine Bank loan, Claude Fortin, attempted to secure alternate financing. During this time, American Falcon retained possession of the Capital 737. Bank SUF ¶¶ 200, 220-23; Chrans SUF ¶ 130. Capital

ceased operations in November 2002. Chrans SUF ¶ 129.

In April 2002, Chrans advised the Plaintiffs that American Falcon would not be able to make lease payments to ROTFL. As a result, the Plaintiffs contributed to ROTFL \$11,214.00 per couple, per month in 2002 and early 2003, for a total of \$100,926.00 per couple. The money was deposited into a ROTFL account and used to make payments to the Bank. Bank SUF ¶¶ 203-05. Plaintiffs' Response to Bank SUF ¶¶ 35-36.

In May and June 2002, McGlasson, Chehab, and representatives of Cap III met to discuss repairing the F-28 and putting it back in service. American Falcon would rent the plane on an hourly basis. In June 2002, the Bank loaned \$275,000.00 to Cap III to repair the F-28 and get it back into service. Bank SUF ¶¶ 214-15.

In July 2002, Chrans and Chehab presented the Barons and the Mallavarapus with the opportunity to participate in the purchase of a competing carrier called Dinar. Dinar was in financial distress and owed money to American Falcon. Chrans and Chehab told the Mallavarapus and the Barons that the purchase of Dinar would provide an opportunity to collect the money owed to American Falcon, acquire new routes and more airplanes. The Mallavarapus and the Barons sent Chehab \$250,000.00 per

couple to invest in Dinar. Chrans and Chehab represented that each couple would be a 25 percent owner of Dinar; Chrans and Chehab would each own 25 percent also. According to Dr. Baron, Chrans and Chehab represented that Dinar filed bankruptcy proceedings in Argentina and stopped operating. According to Dr. Baron, Chrans and Chehab did not invest the money in Dinar, but he never learned where the money went. 2-14-07 T. Baron Deposition, at 67-72, 91-93; 2-15-07 T. Baron Deposition, at 10-14. According to Chrans, Dinar was purchased while it was in bankruptcy, but Dinar did not successfully come out of bankruptcy and was closed. Chrans stated that a creditor called Banco Nacion arbitrarily took Dinar's revenues in violation of Argentinian bankruptcy laws and effectively forced the closure. Plaintiffs' Exhibits, Exhibit N, Deposition of Willis Chrans on February 9, 2007, at 285-91; and Exhibit XX, Chehab October 6, 2002, email.

On January 10, 2003, a new limited liability company called Alpha Foxtrot, LLC (Alpha Foxtrot) was formed to purchase the Capital 737. On that date, Chehab sent McGlasson a proposal to have Alpha Foxtrot borrow \$2,000,000.00 from the Bank to finance the purchase of the Capital 737 from Capital. Under the proposal, \$1,700,000.00 of the proceeds would be

used to purchase the plane, and the remaining \$300,000.00 would be used for required maintenance. On January 15, 2003, Chrans and Chehab sent an email to the Plaintiffs outlining the terms of the proposal to purchase the Capital 737. The email stated that the current guarantors, Jeremy Michaels and Claude Fortin, would remain as guarantors up to \$700,000.00. The Plaintiffs and Chrans and Chehab would each sign guarantees up to \$250,000.00. The email also stated that the Plaintiffs should anticipate a profitable year for American Falcon. Bank Motion, Chrans Exhibit 79, January 15, 2003, email. Thereafter, in January 2003, the Plaintiffs became members in Alpha Foxtrot. The Bank agreed to make the \$2,000,000.00 loan to Alpha Foxtrot to purchase the Capital 737. The Plaintiffs signed the Alpha Foxtrot Operating Agreement on January 27, 2003. The loan closed on January 31, 2003. The Plaintiffs signed guarantees limited to \$250,000.00 to guarantee this debt. Bank SUF ¶ 245; Chrans SUF ¶ 131.<sup>8</sup> The dollar limits on the Plaintiffs' ROTFL and Alpha Foxtrot guarantees totaled \$1,090,000.00 per Plaintiff couple (\$840,000.00 on the ROTFL

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<sup>8</sup>The Plaintiffs claim that Chrans concealed the fact that the Capital 737 was worth considerably less than \$1,700,000.00. Plaintiffs' Response to Chrans, at 24, ¶ 79. This assertion, however, is based only on hearsay. 2-14-07 T. Baron Deposition, at 247. Hearsay is not competent evidence to oppose summary judgment. Fed. R. Civ. P. 56(e).

guarantee and \$250,000.00 on the Alpha Foxtrot guarantee). The Alpha Foxtrot guarantees were unconditional, absolute guarantees with substantially the same terms as the ROTFL guarantees. Bank Motion, Exhibits 293, 295-96, Personal Guarantees.

At the closing on the Alpha Foxtrot loan, Dr. Trask asked McGlasson about the risk in connection with the loan and the guarantees. McGlasson advised Trask that the incremental risk was minimal in the range of \$100,000.00 to \$200,000.00. McGlasson said that the Bank would have a lien on the Capital 737 and would attempt to repossess and sell the plane before looking to the guarantors. Plaintiffs' Exhibits, Deposition of Robert Trask on February 20, 2007 (2-20-07 R. Trask Deposition), at 49-53, 58. At some point, in connection with either the ROTFL loan or the Alpha Foxtrot loan, McGlasson stated to the Trasks that the loan for the purchase of an airplane was just like a real estate mortgage because the plane was collateral to secure the loan and the Bank would look to the collateral before calling the guarantees. Id., at 58; Plaintiffs' Exhibits, Exhibit T, Deposition of Mary Trask, at 115.

The Bank did not register its mortgage on the Capital 737 in Argentina. McGlasson states that Chehab asked for permission to file the



documents in Argentina to save money, and McGlasson agreed. Chehab, however, never registered the documents. Bank SUF ¶ 255.

In May 2003, Chehab contacted the Bank regarding the possibility of American Falcon purchasing the F-28. While these negotiations were ongoing, Drs. Baron and Mallavarapu traveled to Argentina. Dr. Baron remembered meeting with Chrans and Chehab to discuss participating in a group to buy the F-28. The Plaintiffs also state that Chrans and Chehab did not disclose to them that the engines on the F-28 were “timed out” and could not be returned to service. Drs. Baron and Mallavarapu ultimately decided to participate in the venture. The venture was organized as an Argentinian corporation known as Falcon Air, S.A., (Falcon Air). Drs. Baron and Mallavarapu state Chehab and Chrans told them that the four of them would own Falcon Air, each would own 25 percent of the stock. Drs. Baron and Mallavarapu state that Falcon Air never issued any stock to them. The Plaintiffs claim Chrans, in fact, set up Falcon Air to be held solely by Chrans and Chehab. Plaintiffs’ Exhibits, 2-14-07 T. Baron Deposition, at 101-03, 114-16; Exhibit R, Deposition of Thomas Baron on February 15, 2007 (2-15-07 T. Baron Deposition), at 79-82; 1-29-07 C. Mallavarapu Deposition, at 175-78, 274-76. Chrans states that he was not

involved in the Falcon Air transaction. Chrans Motion, Exhibit 7, Declaration of Willis Chrans (Chrans Declaration), ¶ 22.

Falcon Air proposed to the Bank to borrow \$3,700,000.00. The purchase price for the F-28 would be \$2,700,000.00, and the remaining \$1,000,000.00 would be used for repairs and maintenance. Chehab sent McGlasson an email on June 3 or 4, 2003, stating that the value of the F-28, after repairs, would be anywhere between \$1,100,000.00 and \$1,500,000.00. Plaintiffs' Exhibits, Exhibit X, Deposition of Michael McGlasson on March 7, 2007, at 148.

On June 24, 2003, Chehab sent an email to Chrans, Dr. Baron, and Dr. Mallavarapu telling them that \$1,000,000.00 in proceeds over the purchase price would be used to pay operational expenses rather than for maintenance and repairs on the F-28. He also said not to tell the Bank representatives about this. Bank SUF ¶ 270. Dr. Baron states that he told Kelley about the plan to use the \$1,000,000.00 to pay debts. According to Dr. Baron, Bank's loan officer James Kelley responded, "[T]hat's what we thought he probably would do with the money." 2-15-07 T. Baron Deposition, at 218.

The Falcon Air loan closed on July 11, 2003. The Bank loaned Falcon

Air \$3,700,000.00. Chehab, Chrans, the Barons and the Mallavarapus extended their guarantees of the ROTFL and Alpha Foxtrot loans to guarantee this loan as well. Bank SUF ¶ 272. The Bank agreed to let Chehab register the Bank's mortgage lien on the F-28. Chehab never registered the Bank's mortgage. Bank SUF ¶ 276.<sup>9</sup>

On September 3, 2003, the Argentinian government announced that it planned to give a fuel subsidy to a competing airline called Southern Winds, S.A. (Southern Winds). Bank SUF ¶ 279. Thereafter, American Falcon sought unsuccessfully to be included in the proposed subsidy.

American Falcon and the related entities had difficulty making the payments on the various loans to the Bank. The Bank agreed to interest-only payments on the ROTFL loan for August, September and October 2003. Even so, the September payment was late for all of the loans, including the ROTFL interest-only payments. The Bank agreed to take a reduced payment of \$35,000.00 for all of the loans in September 2003. The actual amount due was over \$69,302.53. Bank Motion, Exhibit 327, Kelley email dated September 25, 2003, and Exhibit 328, Chrans email

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<sup>9</sup>The Plaintiffs dispute whether the Bank made this decision before or after the closing of the loan. Plaintiffs' Response to Bank, at 12, Response to Bank SUF ¶ 276.

dated September 26, 2003. In November 2003, the Bank agreed to modify the payment schedule to allow higher payments in some months of the year and lower payments in other months to track the seasonal nature of American Falcon's business. Bank SUF ¶ 287.

Between November 18 and 22, 2003, Kelley traveled to Buenos Aires on behalf of the Bank to meet with Chehab and Chrans. Dr. Trask states that Kelley spoke to him before he went. Dr. Trask states that Kelley told Dr. Trask that he would find out as much as possible and report to Dr. Trask. Plaintiffs' Response to Bank, Exhibit U, 2-20-2007 R. Trask Deposition, at 196. In Argentina, Kelley photographed American Falcon's offices and gathered other information. Kelley prepared a Power Point presentation to show to the Bank's Board of Directors. Upon his return to Springfield, Kelley sent an email to Chehab and Chrans which said, in part: "I will be sharing my presentation with [the Trasks] . . . . I will continue to show my support and enthusiasm for your great company." Plaintiffs' Response to Bank SUF ¶ 79.

Kelley then showed the presentation to the Trasks, and McGlasson was also present. The other Plaintiffs did not see the presentation. According to the Trasks, Kelley was generally very positive. He left the

Trasks with the feeling that their American Falcon investments were very promising. Dr. Trask asked McGlasson and Kelley if it was a good idea to continue to invest in American Falcon. Dr. Trask states that he told McGlasson and Kelley about Chehab's offer to sell him additional shares. According to Trask, McGlasson and Kelley stated that American Falcon had good business prospects, good prospects for profitability, good routes and planes, and lots of business expansion opportunities. They also stated that the economy was improving, that the picture looked optimistic, and that American Falcon was a good place for their money. After the meeting, Dr. Trask sent \$100,000.00 to Chehab to buy additional American Falcon stock. Mary Trask Deposition, at 22, 119-20; 2-20-07 R. Trask Deposition, at 66, 190-92.

At about the same time as the Power Point presentation, the Plaintiffs state that Kelley told Dr. Baron that things were looking up and were getting better at American Falcon and that the Bank's interests were really the same as the guarantors', and that they all wanted the same thing. 2-16-07 T. Baron Deposition, at 52-56.

Throughout this time, Chehab attempted to persuade various governmental officials to include American Falcon in the proposed fuel

subsidy for Southern Winds. The Plaintiffs attempted to enlist the help of U.S. officials to lobby for the subsidy, also. Kelley participated in these efforts. Kelley traveled to Argentina in February 2004, to participate in a meeting with an American official at the United States Embassy. Baron, Chehab and Chrans were also at the meeting. The efforts all proved unsuccessful. Bank SUF ¶¶ 303-04.

On March 2, 2004, Chrans notified the Plaintiffs that American Falcon would not be able to make good on the \$40,000.00 check it had sent to the Bank as a payment on the ROTFL, Alpha Foxtrot and Falcon Air loans. On March 3, 2004, Chrans told the Plaintiffs that he had contacted Kelley to find out how the Plaintiffs should deposit funds to make the check good. Kelley told Chrans that the funds should be deposited into American Falcon's account on which the check was drawn. The Plaintiffs did so. On March 4, 2004, Kelley sent an email to the Plaintiffs, Chehab, and Chrans, that said, "I will send the American Falcon check over for processing tomorrow. Thank you." Bank SUF ¶¶ 305-09. Chehab stopped all operations of American Falcon in March or April 2004. Chrans SUF ¶ 147. American Falcon resumed flights in June 2004. Chrans SUF ¶ 156.

In April 2004, Chrans gave Chehab a general power of attorney on

behalf of Alpha Foxtrot and Falcon Air which authorized Chehab to grant liens on the planes owned by those entities. Plaintiffs' Exhibits, Exhibit O, Deposition of Willis Chrans on March 28, 2007 (3-28-07 Chrans Deposition), at 526-28; 2-14-07 T. Baron Deposition, at 145-46. Chehab subsequently used the powers of attorney to place liens on the aircraft to secure a personal loan to him from Aerolineas Argentina, discussed below.

On May 16-17, 2004, the Bank made another loan to Falcon Air in the amount of \$410,070.00 to use to purchase an engine for the F-28. The personal guarantees of Chehab, Chrans, the Barons, and the Mallavarapus made in connection with the loans to ROTFL and Alpha Foxtrot were extended to cover this debt to Falcon Air. Bank SUF ¶ 316.

In 2004, an airline known as Lan Chile offered to purchase American Falcon. Lan Chile offered to pay approximately \$2,500,000.00 for American Falcon and to lease the Capital 737 and F-28 for two years. At the same time, Chehab negotiated an alternative proposal in which Aerolineas Argentina would lend \$2,000,000.00 to Chehab personally to finance American Falcon. Chrans SUF ¶156.

In July 2004, there was a telephone conference to discuss these options. Kelley participated in the telephone conference. Kelley told

investors that the Aerolineas Argentina proposal was a better deal, that no one besides Chehab could have pulled it off, and that it was a great thing. Kelley stated that the proposal was better because the planes would be leased longer. Dr. Mallavarapu stated based on Kelley's advice, the Lan Chile offer was rejected, and Chehab was authorized to make the personal loan from Aerolineas Argentina secured by the Alpha Foxtrot and Falcon Air airplanes. The Plaintiffs did not know at this time that the Bank had not registered its liens on these planes. Plaintiffs' Exhibits, Exhibit J, Deposition of Christopher Mallavarapu on January 30, 2007 (1-30-07 C. Mallavarapu Deposition), at 18-21; Chrans SUF ¶¶ 150, 156. Thus, Aerolineas Argentina secured a first lien position on the Capital 737 and F-28 and effectively cut off the Bank's liens on these planes.

On or about July 6, 2004, Chrans executed an Agreement on behalf of ROTFL and Alpha Foxtrot selling to Chehab for \$40.00, more than \$5,000,000.00 in outstanding lease payments that American Falcon owed to ROTFL and Alpha Foxtrot. Chrans Deposition, at 17-18; Second Amended Complaint, ¶¶ 172-74 and Chrans' Answer and Affirmative Defenses (d/e 107), ¶¶ 172-74. Chrans stated that he did this to make American Falcon solvent; otherwise Chrans understood that Argentinian law



would require the immediate liquidation of American Falcon. Chrans Motion, Exhibit 7, Declaration of Willis Chrans, ¶ 26.

By September 2004, ROTFL, Alpha Foxtrot, and Falcon Air were all in default on their loans to the Bank. Chrans sent an email to Drs. Trask, Baron, and Mallavarapu attaching a financial statement. The financial statement showed a cumulative loss for the fiscal year through July 2004 of (\$4,183,115.98). On or about September 24, 2004, the Bank, the borrowers, and the guarantors entered into a Loan Consolidation and Forbearance Agreement (2004 Agreement). The 2004 Agreement restructured the payments on all of the outstanding debt. The borrowers were to pay \$90,000.00 by September 30, 2004. Thereafter, for four months, the total monthly payment on all of the loans would be \$120,000.00; for the next four months, the total monthly payment would be \$130,000.00; for the next four months, the total monthly payment would be \$140,000.00; and thereafter the total monthly payment would be \$150,000.00. In exchange, the Bank agreed to forbear pursuing other remedies, and the guarantors waived any defenses that they might raise based on the 2004 Agreement and reaffirmed their obligation to pay the debts under the terms of the guarantees. Second Amended Complaint,

Exhibit 20, Loan Consolidation and Forebearance Agreement.

On September 27, 2004, Kelley sent the 2004 Agreement to the Plaintiffs for signature. Kelley stated in the email, in part: "From the reports I am receiving American Falcon is in as [sic] the best shape ever. The high season is rapidly approaching and the expectations are for a very busy season. Please do not delay in returning this document to me. I must have this completed by September 29, 2004." Plaintiffs' Response to Bank SUF ¶ 99.

On September 30, 2004, American Falcon borrowed another \$3,000,000.00 from the Bank. As in the August 2001 transaction, the \$3,000,000.00 was placed in a Certificate of Deposit at the Bank to secure the loan. Kelley understood the loan was used to meet Argentinian legal requirements for solvency. This transaction was not disclosed to the Plaintiffs. Plaintiffs' Response to Bank SUF ¶¶ 104-06.

On October 28, 2004, Chrans told the Plaintiffs that things were turning around for American Falcon, and its cash flow would improve over the next three months. Plaintiffs' Response to Chrans SUF ¶ 95. By November, however, American Falcon defaulted on the 2004 Agreement. The November and December 2004 payments were not made on time.

Plaintiffs' Response to Bank SUF ¶ 89.

At about that time, Chrans was soliciting money from the Mallavarapus to buy another airplane referred to as the Cardinal airplane. Chrans, however, did not disclose to the Plaintiffs that Chrans, Bentley and Chehab had set up a company called Wild West Airplanes, Inc., and purchased the Cardinal airplane in October 2004. 3-28-07 Chrans Deposition, at 574-592, 602-11; 1-30-07 C. Mallavarapu Deposition, at 63.

In November and December 2004, Kelley contacted Drs. Baron, Mallavarapu, and Trask to ask them to contribute money to make the payments called for under the 2004 Agreement. Kelley told the Plaintiffs that he was concerned because the bank examiners were coming, and if the Bank had a certain percentage of non-performing loans, the Federal Reserve would increase the rate charged to the Bank and decrease the Bank's profit. Kelley said that the Bank's President Tom Marantz would get very mad about this situation at board meetings. Kelley asked the three men to help the Bank out by providing money to cover these payments. Kelley also said to Dr. Trask that the infusion of additional capital would give American Falcon some breathing room so that it could return to profitability. 2-14-07 T. Baron Deposition, at 153-55; 1-30-07 C. Mallavarapu Deposition, at 39;

2-20-07 R. Trask Deposition, at 210-13.

In response, the Plaintiffs, as couples, each made payments of \$26,667.00 to the Bank in November and December 2004 for a total of \$53,334.00 per couple. Plaintiffs' Response to Chrans SUF ¶¶ 91-93.

About this time, Kelley also told Dr. Baron that Bank President Marantz stated that he thought Chehab was a crook, but McGlasson thought he was an honest man trying to do the best he could. Kelley never previously disclosed Marantz's opinion of Chehab to Plaintiffs. 2-14-07 T. Baron Deposition, at 156-58.

In the meantime, Chrans continued to solicit funds from the Mallavarapus to buy another airplane. The Mallavarapus ultimately contributed \$500,000.00 for the purchase of a plane identified as the Ryan aircraft. See Bank Motion, Exhibit 465, Summary of Plaintiffs' Payments, Mallavarapu \$500,000.00 Payment to Chehab on January 31, 2005. The funds were not used to purchase the plane. Chrans did not disclose the purpose for which the funds were used. 1-30-07 C. Mallavarapu Deposition, at 63-68; 3-28-07 Chrans Deposition, at 574-92, 602-11.

On January 12, 2005, Chrans emailed Drs. Trask, Baron, and Mallavarapu with a financial statement for American Falcon for the months

of October and November 2004. The statement showed a loss in October of (\$356,888.00), and a loss in November of (\$248,395.00). Chrans Motion, Exhibit 74, January 12, 2005, Email.

In February 2005, there was a meeting between Chrans, Chehab, Dr. Baron, Dr. Mallavarapu, and Kelley. Kelley and the others learned at this time that Chehab had not perfected the Bank's liens on the Falcon Air and Alpha Foxtrot planes, but, instead, had granted liens on those planes to Aerolineas Argentina to secure the personal loan to him. The men also discussed modifying the 2004 Agreement further to restructure the payments to the Bank once more. 1-29-07 C. Mallavarapu Deposition, at 190-91; 1-30-07 C. Mallavarapu Deposition, at 17-27. Also in February 2005, Kelley told Mrs. Baron that American Falcon was worth between \$50,000,000.00 and \$60,000,000.00 and that she was going to be a rich woman. Plaintiffs' Exhibits, Exhibit P, Deposition of Linda Baron on February 13, 2007, at 20.

The negotiations regarding modifying the 2004 Agreement continued and culminated in a Modification of Loan Consolidation and Forbearance Agreement dated May 2005 (2005 Agreement). Bank Motion, Exhibit 467, 2005 Agreement. The 2005 Agreement provided for interest-only payments

until October 2005. In connection with the 2005 Agreement, the guarantors, including the Plaintiffs, executed an Agreement entitled “Agreement of Guarantors and Lender” (2005 Guarantor Agreement). Bank Motion, Exhibit 468, 2005 Guarantor Agreement. Under the terms of the 2005 Guarantor Agreement, each guarantor affirmed his or her obligations under the guarantees, and further agreed that in the event of a default on the 2005 Agreement, each guarantor would execute a personal promissory note in favor of the Bank in the total amount of each guarantor’s obligations under the guarantees. Thereafter, on May 30, 2005, American Falcon filed for bankruptcy in Argentina. Bank SUF ¶ 338.

By the end of June 2005, the loans were going to be 90 days past due. The Bank then made a \$150,000.00 loan to Chehab on June 30, 2005. The proceeds of the loan were used to make a payment on the outstanding debt. The Bank treated the transaction as a partial call of Chehab’s guarantee in the amount of \$150,000.00. In connection with this loan, Chrans signed unlimited guarantees on behalf of ROTFL and Alpha Foxtrot, guaranteeing Chehab’s debt to the Bank. Thereafter, Chrans resigned as Manager of Falcon Air and Alpha Foxtrot. Chehab has not repaid the loan to the Bank. Plaintiffs’ Exhibits, Exhibit AA, Deposition of James Kelley on March 13,

2007, at 39-45.

On July 28, 2005, the Bank sent notices to the Plaintiffs that the loans were in default. The Bank gave the Plaintiffs ten days to cure the default. Under the 2005 Agreement, the Plaintiffs were to sign new promissory notes in exchange for their guarantees if the defaults were not cured. The Plaintiffs neither cured the defaults nor signed any new notes. Bank SUF ¶¶ 355-56.

Thereafter, the Bank has attempted to collect from the various guarantors. Chrans executed a promissory note in favor of the Bank for \$716,667.00. Jeremy Michaels executed a promissory note in favor of the Bank for \$610,000.00. Chehab borrowed \$1,090,000.00 from the Bank. The proceeds from all of these loans were applied to the ROTFL, Alpha Foxtrot, and Falcon Air debts. Another guarantor, Dr. Sigsbee Duck, paid the Bank \$730,000.00 which was also applied to the outstanding loans of the companies. The Plaintiffs, however, did not pay anything after the Bank declared the default.<sup>10</sup>

As of January 1, 2008, the outstanding balances on the loans are:

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<sup>10</sup>Guarantors Fortin and Martin filed bankruptcy and discharged their obligations to the Bank. Bank SUF ¶ 289; Opinion entered May 10, 2006 (d/e 94), at 5.

ROTFL      \$2,359,849.45 principal, and  
                 \$1,145,282.59 interest;  
Alpha Foxtrot    \$1,127,302.45 principal, and  
                 \$536,038.56 interest;  
Falcon Air (I)    \$1,950,562.90 principal, and  
                 \$944,719.44 interest; and  
Falcon Air (II)   \$393,947.69 principal, and  
                 \$182,108.39 interest.

The per diem accrual of interest is:

ROTFL              \$1,163.76;  
Alpha Foxtrot    \$555.93;  
Falcon Air (I)    \$961.92; and  
Falcon Air (II)   \$194.28.

Bank SUF ¶¶ 361-62. The total dollar limit on the face of the guarantees signed by each Plaintiff couple in connection with the outstanding loans was \$1,090,000.00, plus interest, attorney fees, and costs of collection.

As alluded to above, from 2000 to 2005, the Plaintiffs paid various sums over time in relation to American Falcon, ROTFL, Alpha Foxtrot, and Falcon Air ventures. The total sums paid by each Plaintiff couple are as



follows:

The Mallavarapus:	\$3,647,049.00;
The Barons:	\$1,624,898.00; and
The Trasks:	\$1,175,868.00.

Bank Motion, Exhibit 485, Summary of Plaintiff Payments; 2-14-07 T. Baron Deposition, at 189; 1-25-07 J. Mallavarapu Deposition, at 18-19; and 2-19-07 M. Trask Deposition, at 26-27.<sup>11</sup>

### ANALYSIS

The Plaintiffs bring claims against the Defendants for federal securities fraud (Count I), common law fraud (Count II), negligent misrepresentation (Count III), fraudulent concealment (Count IV), consumer fraud in violation of the Illinois Consumer Fraud Deceptive Business Practice Act (Consumer Fraud Act) (Count V), state securities law fraud (Count VI), breach of fiduciary duty (Counts VIII and IX), and civil conspiracy (Count XII). 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5; 815 ILCS 505/2; 815 ILCS 5/12(F). The other counts have been dismissed. The Bank counterclaimed

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<sup>11</sup>The Plaintiffs provide hearsay evidence of an expert's opinion that disputes these numbers. Plaintiffs' Exhibits, Exhibits A-F, Plaintiffs' Declarations. Such hearsay is not competent to oppose a summary judgment motion. Fed. R. Civ. P. 56(e). In addition, Mary Trask stated in her deposition that there may have been more investments, but she provided no details. M. Trask Deposition, at 27.

for the sums due and owing on the debts guaranteed by the Plaintiffs. The Bank, McGlasson, and Kelley have now settled with the Plaintiffs. The remaining Defendants all seek summary judgment.

At summary judgment, each Defendant must present evidence that demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The Court must consider the evidence presented in the light most favorable to the Plaintiffs. Any doubt as to the existence of a genuine issue for trial must be resolved against a Defendant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Once a Defendant has met his burden, each Plaintiff must then present evidence to show that issues of fact remain with respect to an issue essential to his or her case, and on which he or she will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322; Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Defendants Bentley and RES have demonstrated a right to summary judgment on all claims; Defendant Chrans has demonstrated a right to partial summary judgment. The Court addresses the Motions for Summary Judgment on the Plaintiffs' claims against Bentley and RES, and then Chrans.

#### I. THE PLAINTIFFS' CLAIMS AGAINST BENTLEY AND RES

The evidence of wrongful conduct by Bentley and RES concern the June 2000 transaction in which the Plaintiffs acquired membership interests in AMFAL Investment, and AMFAL Investment acquired stock in American Falcon. Bentley and RES were involved in preparing and distributing the Offering Documents. Bentley also cashed in one-third of his investment, turning \$90,000.00 into \$110,000.00 in less than a year.

Thereafter, however, RES and Bentley had little involvement with the Plaintiffs. Bentley provided some financial statements that showed significant losses. Bentley also made a presentation in 2001 about leasing airplanes to American Falcon. No evidence indicates that any of these activities involved any misrepresentations or fraudulent conduct. RES is not mentioned significantly in the evidence after the initial offering. Bentley was involved in the Wild West Airlines in 2004, but Plaintiffs present no evidence that he made any misrepresentations to them about this endeavor. Thus, the Plaintiffs' claims are limited to the June 2000 transaction.

Those claims are barred by the statute of limitations. The federal and state securities laws both have a five year statute of repose. 28 U.S.C. § 1658; 815 ILCS 5/13(D). The state statute bars all types of state law actions arising from the securities transaction, even under other theories of

recovery such as the other state law claims asserted by the Plaintiffs. Klein v. George C. Kerasotes Corp., 500 F.3d 669, 671-74 (7<sup>th</sup> Cir. 2007); Tregenza v. Lehman Bros., Inc., 287 Ill.App.3d 108, 109-10, 678 N.E.2d 14, 15 (Ill.App. 1<sup>st</sup> Dist., 1997). Here, the membership interests were issued to the Plaintiffs and the stock was sold to AMFAL Investment in June 2000. The Plaintiffs filed this action more than five years later in September 2005. The claims against Bentley and RES, thus, are barred.

The Plaintiffs argue that the sale of American Falcon stock was not complete until after September 2000, because the individual Plaintiffs did not receive stock certificates until after that date. The Court disagrees. The original transaction called for AMFAL Investment, a limited liability company, to buy the American Falcon stock. So, of course, the American Falcon stock was not issued to the individual Plaintiffs, but to AMFAL Investment. The members of AMFAL Investment did not decide to hold the stock personally until February 2001; thus, the shares were not issued to them personally until after that date. The relevant sale, however, occurred in June 2000. The claims against Bentley and RES are barred.

## II. CLAIMS AGAINST CHRANS

### A. Counts I and VI Securities Fraud

The Securities and Exchange Act § 10(b), and Rule 10b-5 promulgated thereunder, prohibit making a material misrepresentation of fact, or omitting a material fact necessary to make a statement not misleading, in connection with the purchase or sale of a security. 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5. To overcome summary judgment, the Plaintiffs must present evidence of: (1) a material misrepresentation or omission; (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) a causal connection between the material misrepresentation or omission and the loss. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, \_\_ U.S. \_\_, 128 S.Ct. 761, 768 (2008); Ray v. Citigroup Global Markets, Inc., 482 F.3d 991, 994 (7<sup>th</sup> Cir. 2007). To be material, the representation or omission must significantly alter the total mix of available information. Acme Propane, Inc. v. Tenexco, Inc., 844 F.2d 1317, 1322 (7<sup>th</sup> Cir. 1988). If the plaintiff presents evidence of a material omission, the plaintiff must also present evidence that the defendant had a duty to disclose the information. Chiarella v. United States, 445 U.S. 222, 234 (1980).

The Illinois Securities law also prohibits fraud in the purchase or sale of securities. 815 ILCS 5/12. The elements of the state securities fraud

claim parallel the elements of the federal § 10(b) and Rule 10b-5 claim, except that a plaintiff need not prove scienter. Foster v. Alex, 213 Ill.App.3d 1001, 1003-04, 572 N.E.2d 1242, 1244 (Ill.App. 5<sup>th</sup> Dist., 1991); Branch-Hess Vending Services Employees' Pension Trust v. Guebert, 751 F.Supp. 1333, 1341 (C.D.Ill., 1990).

Unlike Bentley and RES, Chrans was actively involved in promoting and managing the Plaintiffs' investments in these various entities from June 2000 until May 2005. The claims based on the June 2000 transaction are barred by the statutes of repose, but the claims based on later events are not so barred.

The other four securities transactions were: (1) the issuance of membership interests in ROTFL in October 2001; (2) the issuance of membership interests in Alpha Foxtrot in January 2003; (3) the issuance of stock in Falcon Air in May or June 2003; and (4) the Trasks' purchase of additional shares of American Falcon from Chehab in December 2003. There is no evidence that Chrans was involved in the December 2003 transaction with the Trasks; thus, the securities claims against Chrans are limited to the ROTFL and Alpha Foxtrot limited liability company membership issuance, and alleged Falcon Air stock fraud.

The evidence generally shows that from February 2001 through the Falcon Air securities transaction in June 2003, Chrans was continually making positive misstatements to Plaintiffs about these related ventures. During the April 26-27, 2001, meeting, Chrans told the Plaintiffs that conditions were favorable for American Falcon's business plan to succeed despite the undercapitalization of Capital. On or about May 14, 2001, Chrans told the Plaintiffs to ignore the financial statements that showed a \$2 million loss from October 2000 to April 2001. On July 2, 2001, Chrans told the Plaintiffs that American Falcon had lucrative routes and needed more planes to secure more lucrative routes. Chrans repeatedly told the Plaintiffs that there was nobody better than Chehab to run American Falcon. On September 21, 2001, Chrans told ROTFL investors that ROTFL would realize from \$85,000.00 to \$95,000.00 in gross income with positive net cash flow of \$26,000.00 to \$34,500.00 per month. On September 15, 2001, Chrans told the Plaintiffs that American Falcon just needed time to be successful. On September 28, 2001, Chrans told the Plaintiffs that the addition of a Boeing 737 to American Falcon would allow American Falcon to take full advantage of the business opportunities that were continuing to flow into the company. In March 2002, Chrans said that

American Falcon had a bright future. In September 2002, Chrans told the Plaintiffs that American Falcon would be turning profitable and that the future looked bright. In December 2002 or January 2003, Chrans told Plaintiffs that the purchase of another Boeing 737 through Alpha Foxtrot would enable American Falcon to begin realizing profits. In January 2003, Chrans told the Plaintiffs that he anticipated a very profitable year for American Falcon.

In addition, the Plaintiffs present evidence that Chrans made certain specific representations that were false. After the ROTFL closing, Chrans stated that the \$400,000.00 rebate would be used to buy shares of American Falcon for ROTFL. In June 2003, Chrans told Dr. Baron and Dr. Mallavarapu that the owners of Falcon Air would be the Barons, the Mallavarapus, Chehab and Chrans.<sup>12</sup> The Plaintiffs have presented evidence that these representations were false.

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<sup>12</sup>Plaintiffs also present evidence of other specific representations, but do not present evidence that the specific representations were false. In November 2000, Chrans told the Plaintiffs that American Falcon was attempting to establish a relationship with Air France and needed to borrow \$87,750.00 from each AMFAL Investment member to meet requirements set by Air France. On February 21, 2002, Chrans represented that American Falcon had \$9,000,000.00 to \$13,000,000.00 in charter revenue under contract. In December 2002 or January 2003, Chrans said that operating two Boeing 737s would be more efficient than operating one. In October 2002, Chrans stated that American Falcon's shortage of funds was due to having to renew its insurance policy. The Plaintiffs present no evidence that any of these representations were false.



The Plaintiffs also present evidence that Chrans concealed certain information from the Plaintiffs. As Manager of ROTFL and Alpha Foxtrot, and a director of American Falcon, Chrans owed a fiduciary duty to the Plaintiffs as members and stockholders of these entities. He, thus, had a duty to disclose material information to the Plaintiffs. Chrans did not tell the Plaintiffs that American Falcon owed \$209,000.00 in rent on the F-28 and gave Martin and Mallette additional American Falcon stock in exchange for the forgiveness of that debt. In August 2001, Chrans did not tell the Plaintiffs that American Falcon borrowed \$3,000,000.00 from the Bank and placed the funds in a Certificate of Deposit to inflate American Falcon's cash reserves to satisfy Argentinian regulators. Chrans did not tell the Plaintiffs that he contributed \$335,000.00 of the rebate to American Falcon without receiving anything in return. In June 2003, Chrans did not tell Drs. Baron and Mallavarapu that the engines on the F-28 were timed out and could not be used.<sup>13</sup>

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<sup>13</sup>The Plaintiffs also asserted other omissions, but did not present evidence that the claimed omitted facts were true or that Chrans knew of the information. The Plaintiffs claim that Chrans omitted and concealed the true value of the ROTFL and Alpha Foxtrot planes, but presented no competent evidence of the value of the planes. The Plaintiffs also claim that Chrans concealed the fact that Chehab had not registered the Bank's mortgages on the Alpha Foxtrot and Falcon Air planes, but the Plaintiffs presented no evidence that Chrans knew that Chehab had failed to register the mortgages.

The materiality of the alleged misrepresentation that the Barons and the Mallavarapus would own half of Falcon Air is clear. It is material to misrepresent to an investor that an investor will own 25 percent of a company when in fact he will have no ownership interest at all. Also, the concealment that an engine on the F-28 was timed out and could not be put back into service was material.

The materiality of the other misrepresentations is a more difficult question because the Plaintiffs received so much other information about American Falcon. It is a close question whether Chrans' statements significantly affected the total mix of information available to the Plaintiffs. While Chrans was making his positive representations, the Plaintiffs were receiving a steady stream of negative information about American Falcon. In September 2000, the Plaintiffs learned that: American Falcon had failed to acquire its second airplane as anticipated; the F-28 was experiencing mechanical difficulties; and American Falcon needed an additional \$2,367,039.00 to keep operating until it could get the planes operating as called for in the PPO. In February 2001, the Plaintiffs learned that American Falcon: had net losses of (\$2,099,360.49) for the fiscal year ending September 31, 2000, and net losses of (\$1,193,960.95) for the four

months from October 2000 through January 2001; needed another \$1,477,513.00 to cover losses through May 2001; needed an additional \$250,000.00 for each month that the planes were not acquired and put into operation; and had a projected negative net income of (\$1,104,294.00) for the first quarter of 2001. In April 2001, Chehab reiterated the statement that American Falcon was going to need \$250,000.00 per month to stay afloat. Plaintiff Janet Mallavarapu became the Manager of AMFAL Investment in April 2001. She thereafter asked the members to make monthly payments to service the initial AMFAL Investment debt. She also received regular financial statements from Chehab. On May 14, 2001, the Plaintiffs learned that American Falcon had a net loss of (\$2,005,551.00) for the period from October 2000 through April 2001. The AMFAL Investment members, including the Plaintiffs, had to make monthly payments to AMFAL Investment to service the loan, and ultimately, sign promissory notes to pay back the Bank. In 2002 and 2003, the Plaintiff couples each paid more than \$100,000.00 to help make the monthly payments on the outstanding debts. In the summer of 2002, the Barons and Mallavarapus, as couples, each paid \$250,000.00 to buy Dinar, and in their view, this money just disappeared. All of this evidence calls into

question whether Chrans' representations significantly changed the total mix of information. At this point, the Court must view the evidence favorably toward the Plaintiffs. When viewed in that light, the Court concludes that the Plaintiffs have presented enough evidence to raise an issue of fact on the question of materiality.

The Plaintiffs' evidence also indicates that Chrans had the necessary scienter with respect to the ROTFL, Alpha Foxtrot, and Falcon Air transactions. Scienter can be shown by evidence of reckless conduct that presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that he must have been aware of it. S.E.C. v. Gorsek, 222 F.Supp.2d 1099, 1110 (C.D.Ill., 2001). In this case, Chrans described himself as an activist investor. He said that he spent half of his time learning American Falcon's operations. This evidence provides circumstantial proof that he would be aware of the falsity of his representations about the status of American Falcon, and the significance of the omitted information, related to the ROTFL, Alpha Foxtrot, and Falcon Air transactions.

Chrans argues that some of the evidence of misrepresentations and omissions was not pleaded with sufficient specificity in the Second

Amended Complaint. The Court agrees that the Plaintiffs had to plead the misrepresentations and omissions with specificity. Fed. R. Civ. P. 9(b). However, the Plaintiffs presented evidence of misrepresentations that were pleaded with specificity. See Second Amended Complaint, ¶¶ 216(m), (o), (r), (x), (aa); and ¶¶ 217 (l), (n), (t), and (u). The evidence of other misrepresentations and omissions presented by the Plaintiffs may be considered on the other elements of Plaintiffs' claims, such as intent and reliance. These elements do not have to be pleaded with specificity. Fed. R. Civ. P. 8(a), 9(b). The Court has considered that evidence with respect to those elements.<sup>14</sup> The evidence, when properly considered, supports the findings of the Court.

Chrans also argues that the securities fraud claims are barred by the statutes of limitation. In addition to the statutes of repose, the federal securities laws contain a two-year statute of limitation, and the Illinois securities law contains a three-year statute of limitation. 28 U.S.C. § 1658; 815 ILCS 5/13(D). Chrans argues that the federal claims are all barred by the statute, and all but the Falcon Air claim is barred by the Illinois statute.

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<sup>14</sup>The agreement and intent elements of the civil conspiracy claim and breach of fiduciary duty claim do not need to be pleaded with particularity. Fed. R. Civ. P. 8(a); 9(b).

The Plaintiffs respond that the statute did not begin to run until they learned of the fraud and that happened in 2005.

The federal statute of limitation starts to run when the person knows sufficient facts to be put on inquiry notice that he may have a claim. Law v. Medco Research, Inc., 113 F.3d 781, 785 (7<sup>th</sup> Cir. 1997). The state statute starts to run at essentially the same time. The Illinois statute provides that the time starts to run on “the date upon which the party bringing the action has notice of facts which in the exercise of reasonable diligence would lead to actual knowledge of the alleged violation of this Act.” 815 ILCS 5/13(D)(2).

A person is on inquiry notice when he has learned, or should have learned, the facts that he must know to know that he has a claim. In a securities fraud context, an injured person knows sufficient facts on the date on which the person learned, or should have learned, both that the representations were untrue and that the misrepresentations were knowingly false. Law, 113 F.3d at 786. The information available to the injured person with the exercise of reasonable diligence must be “sufficiently probative of fraud-sufficiently advanced beyond the stage of a mere suspicion, sufficiently confirmed or substantiated-not only to incite the

victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit.” Marks v. CDW Computer Centers, Inc., 122 F.3d 363, 368 (7<sup>th</sup> Cir. 1997) (quoting Fujisawa Pharmaceutical Co., Ltd. v. Kapoor, 115 F.3d 1332, 1335 (7<sup>th</sup> Cir. 1997)). The test is applied objectively from the view of the reasonable investor. Law, 113 F.3d at 786.

In this case, the Plaintiffs had large amounts of information that the impressive projections in the PPO were not coming to fruition in 2001, but very little to indicate that Chrans had knowingly lied to them. Chrans and others tied American Falcon’s problems to the delays in securing airplanes. Furthermore, Chrans may have convinced the Plaintiffs that he believed what he was saying because he put his own credit on the line with the Plaintiffs; he was part of the 737 Group, and he signed the same guarantees that they signed. A jury could conclude that a reasonable investor would not have notice that Chrans made knowingly false statements until some time after September 2003. Chrans is not entitled to summary judgment on the securities claims based on the statute of limitations.

B. Counts II and IV Fraud and Fraudulent Concealment

The Plaintiffs’ evidence also supports claims for common law fraud

and fraudulent concealment. The elements of fraud are: (1) a false statement of fact, (2) known to be false by the party making the statement, (3) made with the intent to induce the other party to act, (4) action by the other party based on justifiable reliance on the statement, and (5) damage. Magna Bank of Madison County, 604 N.E.2d at 545. The elements of fraudulent concealment are the same as fraud except that, instead of a misrepresentation of fact, the plaintiff must show that the defendant concealed a material fact when it had a duty to disclose that fact. W.W. Vincent and Co. v. First Colony Life Ins. Co., 351 Ill.App.3d 752, 814 N.E.2d 960 (Ill.App. 1<sup>st</sup> Dist., 2004). A jury could conclude that Chrans made misrepresentations and omissions intentionally to defraud the Plaintiffs and that the Plaintiffs relied on those misrepresentations to their detriment. Chrans' fiduciary position as Manager of ROTFL and Alpha Foxtrot, and a director of American Falcon, could create a duty to disclose the omissions. The fiduciary relationship is enough to put the fraudulent concealment claim to the jury.

C. Count III Negligent Misrepresentation

The Plaintiffs, further, are entitled to proceed on their negligent misrepresentation claim against Chrans. The elements of a negligent



misrepresentation claim are: (1) a false statement of material fact or an omission of material fact; (2) carelessness or negligence in ascertaining the truth of the statement by the party making it; (3) an intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; (5) damage; and (6) a duty on the party making the statement to communicate accurate information. First Midwest Bank N.A. v. Stewart Title Guar. Co., 218 Ill.2d 326, 334-35, 843 N.E.2d 327, 332 (Ill., 2006). See Zimmerman v. Northfield Real Estate, Inc., 156 Ill.App.3d 154, 163, 510 N.E.2d 409, 414 (Ill.App. 1<sup>st</sup> Dist., 1986) (material omissions resulting in a failure to provide adequate information is sufficient to support a claim of negligent misrepresentation). Plaintiffs must present evidence that Chrans was in the business of providing information to others. Chrans provided information to others through the consulting business at RES. It is unclear the extent to which his relationship to the Plaintiffs was based on his business activities at RES, but there is enough of a connection to put the matter to a jury. The other elements of the claim are clearly present.

D. Count V Consumer Fraud Act Claim

The Plaintiffs' evidence further supports a Consumer Fraud Act claim.

The Consumer Fraud Act prohibits deceptive conduct in connection with the offering or advertising for sale of property in trade or commerce. 815 ILCS 505/2. The elements of a consumer fraud claim are: (1) a deceptive act or practice by the defendant; (2) the defendant intended the plaintiff to rely on the deception; (3) the deception occurred in the course of conducting trade or commerce; (4) the plaintiff suffered actual damage; and (5) the damage was proximately caused by the deception. Oliveira v. Amoco Oil Co., 201 Ill.2d 134, 776 N.E.2d 151, 160 (Ill., 2002). The intent required is only the intent that the plaintiff rely on the deceptive act, not that the defendant intend to deceive. Thus, a Consumer Fraud Act claim may be based on a deceptive act done negligently or innocently if the defendant intended that the plaintiff rely on the act or practice. Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co., 197 Ill.App.3d 948, 953, 557 N.E.2d 246, 250 (Ill.App. 1<sup>st</sup> Dist., 1990). The Plaintiffs' evidence, if believed, shows that Chrans committed deceptive acts in trade or commerce with the intent to induce the Plaintiffs to invest in ROTFL, Alpha Foxtrot, and Falcon Air and to keep contributing money to all of these ventures. The Plaintiffs were damaged thereby. The Plaintiffs may proceed with the Consumer Fraud Act claim

against Chrans.

E. Count VIII Breach of Fiduciary Duty

The evidence also supports a claim for breach of fiduciary duty by Chrans. A fiduciary relationship may arise when one individual places trust and confidence in another who, as a result, gains influence and superiority over the other. Citicorp Sav. of Illinois v. Rucker, 295 Ill.App.3d 801, 692 N.E.2d 1319, 1335 (Ill.App. 1<sup>st</sup> Dist., 1998). Chrans was the Manager of AMFAL Investment, ROTFL and Alpha Foxtrot, and a director of American Falcon. He owed a fiduciary duty to the Plaintiffs as members and stockholders. The Plaintiffs have presented evidence that he committed fraud as discussed above. In addition, he committed other specific acts that could be considered a breach of his duties: Chrans contributed \$335,000.00 of ROTFL funds to American Falcon without receiving any additional equity in American Falcon or other compensation for the members of ROTFL; he gave Chehab a general power of attorney for ROTFL, Alpha Foxtrot, and Falcon Air; he sold over \$5,000,000.00 in ROTFL and Alpha Foxtrot's receivables to Chehab for \$40.00; and he caused ROTFL and Alpha Foxtrot to give the Bank unlimited guarantees of Chehab's debt to the Bank. All of these actions could be construed as a breach of his fiduciary duties to the

Plaintiffs. Chrans argues that his decisions were reasonable under the business judgment rule and were not breaches of his fiduciary duty, but that is a factual issue for the jury. The Plaintiffs have presented evidence to support a claim for breach of fiduciary duty against Chrans.

F. Count XII Civil Conspiracy

The evidence supports a claim for civil conspiracy between Chrans and Chehab. A civil conspiracy claim is an intentional tort that requires proof that a defendant knowingly and voluntarily participated in a common scheme to commit an unlawful act or a lawful act by unlawful means. McClure v. Owens Corning Fiberglas Corp., 188 Ill.2d 102, 134, 720 N.E.2d 242, 258 (Ill., 1999). According to the Plaintiffs' evidence, Chrans and Chehab worked in concert to induce the Plaintiffs to put more and more money into this endeavor. They both promoted the ROTFL and Falcon Air transactions. According to the Plaintiffs' evidence, they both deceived Drs. Baron and Mallavarapu into believing they would receive part ownership of Falcon Air. They both induced Mallavarapu to invest another \$500,000.00 on January 31, 2005, but never used the money to invest in another plane, and never told Mallavarapu what happened to the funds. There is ample evidence of an agreement by these two men to engage in

concerted activity to defraud the Plaintiffs.

THEREFORE, Defendants Steven Bentley and Real Estate Systems of Gillette, Inc.'s Motions for Summary Judgment (d/e 144 & 145) are ALLOWED. Judgment is entered in favor of Defendants Steven Bentley and Real Estate Systems of Gillette, Inc. and against Plaintiffs. Defendants Bentley and Real Estate Systems of Gillette, Inc. are dismissed from this case. Defendant Bank of Springfield's Motion for Summary Judgment (d/e 141), and Defendants Michael McGlasson and James Kelley's Motion for Summary Judgment (d/e 142) are denied as moot. Defendant Willis Chrans' Motion for Summary Judgment (d/e 143) is ALLOWED in part. Partial judgment is entered in favor of Defendant Chrans with respect to the claims arising from the June 2000 formation of AMFAL Investment and the purchase of American Falcon stock by AMFAL Investment; the Court finds that claims with respect to this transaction are barred by the statute of limitations. The Motion is otherwise denied.

IT IS THEREFORE SO ORDERED.

ENTER: July 21, 2008

FOR THE COURT:

\_\_\_\_\_  
s/ Jeanne E. Scott

JEANNE E. SCOTT  
UNITED STATES DISTRICT JUDGE